Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

JIANGSU SOPO CORPORATION (GROUP) LTD.,
Petitioner,

v.

BP CHEMICALS LTD., an English Corporation,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602 *et seq.* (2002), claims against a foreign state (including any agency or government-owned corporation) are outside the subject matter jurisdiction of the courts of the United States, subject to certain specified exceptions. One of these, the "commercial activity" exception, applies where, *inter alia,* the action is "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2) (2002).

The question presented is as follows:

> Under this Court's decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), does the commercial activity exception set forth in the first clause of 28 U.S.C. § 1605(a)(2) apply whenever "one element" of the plaintiff's claim is "based upon" a foreign state's commercial activity in the United States, without regard to the significance of that element to the claim (as held by the Eighth and Ninth Circuits), or must the commercial activity within the United States be the "gravamen" of the claim (as held by the Second, Third, and Fifth Circuits)?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jiangsu Sopo Corporation (Group) Ltd. ("Sopo") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Missouri (App. at 19a-31a) is reported at 144 F. Supp. 2d 1140 (E.D. Mo. 2001). The opinion of the United States Court of Appeals for the Eighth Circuit (App. at 1a-18a) is reported at 285 F.3d 677 (8th Cir. 2002).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 3, 2002. A petition for rehearing was denied on May 22, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Sopo is a corporation organized under the laws of, and wholly owned by, The People's Republic of China ("China"). (C.A. App. 530.) Respondent BP Chemicals Ltd. ("BP"), is a corporation organized under the laws of the United Kingdom and has its principal place of business in that country. (C.A. App. 380.)

The suit was commenced in February, 1999. (C.A. App. 1.) The principal claim advanced by BP in its Amended Complaint (the "Complaint"), and the only one addressed by the court of appeals, is a claim under the Missouri Uniform Trade Secrets Act ("MUTSA"), Mo. Rev. Stat. § 417.453 (2002). BP's Complaint expressly concedes that Sopo, as a wholly-owned government corporation, is entitled to sovereign immunity and is presumptively exempt from the subject matter jurisdiction of this country's courts under the FSIA. The Complaint avers, on information and belief, that

BP's claims are not barred because they fall within the so-called commercial activity exception of the FSIA. 28 U.S.C. §§ 1605-07.

Sopo moved to dismiss BP's complaint under the FSIA for lack of subject matter jurisdiction. (C.A. App. 459-62.) The district court adopted a "gravamen" test and held Sopo immune from suit under the FSIA (App. at 20a), finding that the essential activities on which BP's claim was based occurred in Asia. BP thus failed to carry its burden of proving that either clause one (*see supra*, p. 4) pertaining to commercial activities in the United States, or clause two pertaining to acts performed in the United States in connection with commercial activity elsewhere, of the commercial activity exception applied (BP did not invoke clause three). (App. at 23a-28a.)

The court of appeals, addressing only clause one, reversed, holding that clause one was applicable. (App. at 9a-13a.) The court of appeals, assuming all facts of BP's Complaint to be true, did not disagree with the district court's view that the gravamen of BP's claim consists of activities that took place outside of the United States, but found clause one applicable, holding that the test was whether "one element" of the cause of action "concern[s]" commercial activity in the United States. (App. At 6a.)

I. RELEVANT BACKGROUND FACTS

Sopo owns and operates an acetic acid plant in Zhenjiang City, Jiangsu Province, China. The plant was built pursuant to a 1992 contract, executed in China, between Sopo and a contractor named Shanghai Petrochemical Engineering Co. ("SPECO"). (C.A. App. 537.) Its entire output of product is sold in Asia, primarily in China itself. (C.A. App. 537.) BP claims that this plant incorporates its trade secrets.

SPECO or its subcontractors subcontracted with various companies for the equipment needed to build the plant. (C.A.

App. 4590-4624.) Some of the contracts were with equipment vendors located in the United States. (*Id.*) All of the contracts were executed outside the United States. (*Id.*)

BP's allegations make it clear that any alleged improper acquisition of the trade secrets took place outside the United States, most likely in Taiwan or China. BP alleges that it "has evidence establishing that the 921 Project acetic acid plant—which uses the basic methanol carbonylation process —was designed (and built) with illegal access to BP Chemicals' proprietary technology." (C.A. App. 390.) BP alleges that the 921 plant was modeled on either of two BP-licensed plants, one in Shanghai, China, and one in Taiwan. The Complaint continues by alleging that, "Given the tight secrecy agreements signed by all participants associated with the[se two] projects—which are still in place today—the Chinese defendants [Sopo and SPECO] could not lawfully have come into possession of this licensed technology. Rather, the Chinese defendants obtained access to BP Chemicals' proprietary acetic acid technology through breach of secrecy agreements prohibiting the use and disclosure of the information in question." (C.A. App. 390.)

II. THE DISTRICT COURT'S DECISION

The district court's analysis was straightforward. Recognizing that BP's liability theories rested on the notion that SPECO at all times was acting as Sopo's agent, Judge Perry noted that she did not believe BP sufficiently alleged agency but, even if BP's theory were accepted, *arguendo*, it would make no difference to the FSIA analysis: "Although I do not believe that BP has shown that SPECO was acting as Sopo's agent, I will assume for purposes of this decision that agency exists and that all of SPECO's activities relating to the 921 plant are attributable to Sopo. I do this because it demonstrates that even if SPECO were Sopo's agent, jurisdiction would still not be proper." (App. at 22a-23a.)

The district court upheld Sopo's immunity, based on the "gravamen" test, finding that BP's complaint clearly was founded upon commercial activities carried out in Asia, and bore an immaterial relationship to this country:

> [I]n this case, Sopo's construction of the 921 plant "occurred primarily" in China. Although SPECO contracted with United States vendors and visited the United States in order to procure equipment for the 921 plant, these procurement activities were a relatively small part of the larger process of building the plant. Moreover, Sopo operates the plant in China and sells the acetic acid produced by the plant exclusively within the Chinese market. Sopo's construction and operation of the 921 plant does not amount to commercial activity "in" the United States.
>
> Although SPECO's vendor contracts themselves likely amount to commercial activity occurring in the United States, this commercial activity cannot serve as the predicate for jurisdiction under the first clause of § 1605(a)(2) because this lawsuit is not "based upon" the contracts. In [*Saudi Arabia v.*] *Nelson*, [507 U.S. 349 (1993)] the Supreme Court explained that the "based upon" terminology requires that the cause of action have a nexus stronger than "a mere connection with, or relation to" commercial activity within the United States. *Nelson*, 507 U.S. at 358, 113 S. Ct. 1471. The Court concluded that "the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357, 113 S. Ct. 1471. *In other words, a court must focus on the gravamen of the complaint in determining whether the cause of action is "based upon" commercial activity in the United States.*

(App. at 24a-25a (emphasis added).)

Turning to BP's argument that it had limited its claim to one of "illegal disclosure" in the United States, and was not

challenging activities in Asia, the district court obviously saw the circularity in the argument and rejected it, stating:

> Contrary to BP's assertion, Sopo's activities within the United States are not sufficient to establish a cause of action. All that Sopo allegedly did in the United States was disclose BP's trade secrets to the United States vendors. This act if proved would not itself establish a trade secret misappropriation. For BP to prevail on a misappropriation theory, it would also have to show that Sopo acquired the information in an unlawful manner.

(App. at 27a.)

III. THE COURT OF APPEALS' DECISION

Rather than focusing on the "gravamen" of BP's claim (as the district court did), the court of appeals chose to rely on a "one element" test in determining the issue of sovereign immunity. Thus, the court of appeals stated with regard to clause one of the commercial activity exception, "We emphasize that only one element of a plaintiff's claim must concern commercial activity carried on in the United States," and "only one claim or element of a claim need concern commercial activity in the United States to erode Sopo's presumptive immunity." (App. at 6a, 7a.) The court of appeals found that BP's allegation that a disclosure had taken place in the United States was sufficient to establish the commercial activity exception. (App. at 9a.) In addition, the court of appeals held that BP's "claim satisfies the required nexus with the United States because the claim is linked to Sopo's procurement activities in the United States." (App. at 10a.)

The court of appeals adopted a "one element" test, and, on that basis, found that BP had sufficiently alleged claims based on commercial activity in the United States. As the court below wrote:

> The FSIA contains no definition of "based upon," so we must accord that phrase its plain and ordinary meaning in interpreting the statute. *Nelson*, 507 U.S. at 357, 113

> S. Ct. 1471. "[A] claim is 'based upon' events in the United States if those events establish a legal element of the claim. . . . An action is based upon the elements that prove the claim, no more and no less. If one of those elements consists of commercial activity within the United States or other conduct specified in the Act, this country's courts have jurisdiction." *Santos* [*v. Compagnie Air France*,] 934 F.2d 890, 893 (7th Cir. 1991) (cited approvingly on this point in *Nelson*, *supra*). *We emphasize that only one element of a plaintiff's claim must concern commercial activity carried on in the United States.*

(App. at 6a (emphasis added).)

On the basis of its conclusion that the commercial activity exception required that only "one element" of a claim take place in the United States, the court of appeals disregarded the fact that the core elements of BP's claim concerned foreign parties and activities in Asia.

REASONS FOR GRANTING THE PETITION

I. THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE COMMERCIAL ACTIVITY EXCEPTION UNDER *NELSON*

The FSIA provides that "a foreign state is presumptively immune from the jurisdiction of United States courts" and that, "unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Nelson*, 507 U.S. at 355; *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). The FSIA defines a foreign state to include agencies, instrumentalities, and wholly-owned corporate entities. 28 U.S.C. § 1603(a)(b); *see also* H.R. Rep. No. 94-1487, at 15 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613.

Under the FSIA, the question of immunity is two-fold. First, is the defendant a foreign state? Second, if it is, do the actions complained of fall within one of the exceptions to

immunity defined in the statute? In this case the relevant potential exception is the commercial activity exception of § 1605(a)(2), which provides that the foreign state's immunity is lost when:

> the action is based upon [*clause 1*] a commercial activity carried on in the United States by the foreign state; or [*clause 2*] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [*clause 3*] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

This Court addressed the scope of the commercial activity exception, particularly with regard to clause one, in the *Nelson* case. In *Nelson*, this Court held that the phrase "based upon" in the commercial activity exception "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357. The court cited and quoted *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985), for the proposition that the focus should be on the "gravamen" of the complaint. *Id.* The Court also cited and quoted *Santos*, 934 F.2d at 893, for the proposition that "[a]n action is based upon the elements that prove the claim, no more and no less."

II. THE COURT OF APPEALS' APPLICATION OF A "ONE ELEMENT" DEFINITION OF "BASED UPON" IS IN CONFLICT WITH THE "GRAVAMEN" DEFINITION ESTABLISHED IN *NELSON* AND APPLIED BY OTHER CIRCUITS

The court of appeals, in holding that the commercial activity exception to foreign sovereign immunity would apply even if only "one element" of a claim took place in the United States, went far beyond the scope of that exception, as interpreted and applied by this Court in *Nelson*. But this was

not an isolated or random error. The Eighth Circuit is not alone among the circuit courts of appeal in holding, in ostensible reliance on *Nelson*, that a party invoking the commercial activity exception need only show that "one element" of the claim took place in the United States. *See, e.g., Sun v. Taiwan*, 201 F.3d 1105 (9th Cir.), *cert. denied*, 531 U.S. 979 (2000). Other courts of appeal have hewn more closely to the language and holding of *Nelson* and concluded that the "gravamen" of the cause of action must consist of commercial activity in the United States.[1] *See, e.g., Aldy ex rel. Aldy v. Valmet Paper Mach.*, 74 F.3d 72 (5th Cir. 1996); *Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for Galadari*, 12 F.3d 317, 329-30 (2d Cir. 1993); *Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270 (3d Cir. 1993). This inconsistency and confusion of standards and results seriously undermine the FSIA's purpose of promoting uniformity in the sensitive area of the United States' treatment of foreign states in its courts.

A. In Construing The Phrase "Based Upon" In The Commercial Activity Exception, The Circuit Courts Of Appeal Have Split On Whether A "One Element" Or "Gravamen" Test Applies

Despite the fact that the *Nelson* decision directly addressed the question of what the phrase "based upon" means in the commercial activity exception, the circuit courts of appeal have taken different approaches in interpreting that requirement. Some, like the Eighth Circuit, have applied a "one element" test; some have applied the "gravamen" test. As the instant case demonstrates, the outcome of the analysis is directly affected by which test is applied.

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[1] Still others suggest that the "based upon" language requires a "substantial nexus" or "identifiable nexus" between the commercial activity and the claim. *See, e.g., Haven v. Polska*, 215 F.3d 727 (7th Cir.), *cert. denied*, 531 U.S. 1014 (2000).

1. *Eighth Circuit—"One Element"*

Notwithstanding this Court's undertaking in *Nelson* to define the scope and application of the commercial activity exception, certain of the courts of appeal, including the Eighth Circuit, have apparently viewed the holding of *Nelson* as so broad or so vague as to allow them essentially to fashion their own standard. In this case, the Eighth Circuit decided to adopt a "one element" test and then purported to locate language in *Nelson* to support that result. As the court below wrote:

> The FSIA contains no definition of "based upon," so we must accord that phrase its plain and ordinary meaning in interpreting the statute. *Nelson*, 507 U.S. at 357, 113 S. Ct. 1471. "[A] claim is 'based upon' events in the United States if those events establish a legal element of the claim. . . . An action is based upon the elements that prove the claim, no more and no less. If one of those elements consists of commercial activity within the United States or other conduct specified in the Act, this country's courts have jurisdiction." *Santos*, 934 F.2d 890, 893 (7th Cir. 1991) (cited approvingly on this point in *Nelson*, *supra*). *We emphasize that only one element of a plaintiff's claim must concern commercial activity carried on in the United States.*

(App. at 6a (emphasis added).)

The court of appeals below elected not to refer to the "gravamen" language that this Court quoted approvingly from *Callejo*. *Nelson*, 507 U.S. at 357. Instead, the court of appeals, in support of its "one element" test, chose to rest its decision on language from the Seventh Circuit's *Santos* decision that this Court did not refer to or adopt. (App. at 6a.) Contrary to the assertion of the Eighth Circuit, this Court's decision in *Nelson* did not "cite [*Santos*] approvingly on this point." (App. at 6a.) *Nelson* stated as follows:

> the phrase ["based upon"] is read most naturally to mean those elements of a claim that, if proven, would entitle a

> plaintiff to relief under his theory of the case. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) (focus should be on the "gravamen of the complaint"); *accord*, *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) ("An action is based upon the elements that prove the claim, no more and no less").

Nelson, 507 U.S. at 357. *Nelson* thus endorsed the Seventh Circuit's *Santos* decision insofar as it held that an "action is based upon *the elements* that prove the claim." *Nelson*, 507 U.S. at 357 (emphasis added). This unexceptional (and pluralized) language fails to support the court of appeals' "one element" test.

2. *Ninth Circuit—"One Element"*

The Eighth Circuit was not the first court of appeal to adopt a single element test following this Court's decision in *Nelson*. In its brief before the Eighth Circuit, BP was able to urge the court to apply a "one element" test, with citations to decisions of the Ninth Circuit. As BP asserted:

> The accepted reading of *Nelson* is that an 'action is based on commercial activity in the United States if an element of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States.' *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000), *quoting Sugimoto v. Exportadora De Sal, S.A. De C.V.*, 19 F.3d 1309, 1311 (9th Cir. 1994) (emphasis added).

(BP App. Br. at 36.)

The two post-*Nelson* Ninth Circuit cases cited by BP—*Sun* and *Sugimoto*—do in fact squarely support the "one element" test that the Eighth Circuit adopted in this case. As in this case, the Ninth Circuit resorted to misreadings of *Nelson* to reach that result. In *Sugimoto*, the Ninth Circuit simply asserted, without reference to particular language in *Nelson*, that "an action is based on commercial activity in the United

States if *an element* of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States." *Sugimoto*, 19 F.3d at 1311 (citing *Nelson*, 507 U.S. 355-56) (emphasis added). In *Sun*, the Ninth Circuit found support for its single element test in its prior decision in *Sugimoto*. *Sun*, 201 F.3d at 1109. When the Ninth Circuit turned to the *Nelson* case, it ignored the "gravamen" language, instead referencing this Court's analysis for the unremarkable proposition that "[t]he entire case need not be based on the commercial activity of the defendant." *Id.* at 1109.

3. *Second, Third, and Fifth Circuits—"Gravamen" or "Foundation"*

In contrast, other courts of appeal have applied the "gravamen" test in determining the applicability of the commercial activity exception. *See Drexel Burnham Lambert Group Inc.*, 12 F.3d at 329-30 (applying clause three; "The gravamen of these claims concerns the essentially judicial role of the Committee in marshalling the assets of Galadari . . . and not any of the tangentially related commercial conduct in which the Committee or the Emirate might have engaged."); *Aldy ex rel. Aldy,* 74 F.3d at 75 (applying clause three; because "the gravamen of the plaintiffs' suits are that the paper machine 'was unreasonably dangerous in its construction, make-up composition and design,'" the actions were based on manufacturing defects that were commercial activities of the foreign state elsewhere); *see also Fed. Ins. Co.*, 12 F.3d at 1270 (the commercial activity must form the "basis" or "foundation" for the claim).

III. THE CONFLICT IN APPLICATION OF FOREIGN SOVEREIGN IMMUNITY AMONG THE CIRCUITS IS IN DIRECT OPPOSITION TO CONGRESSIONAL INTENT AND DETRIMENTAL TO CRITICAL POLICY OBJECTIVES

A. The United States Recognized The "One Element"/"Gravamen" Conflict Pre-*Nelson* And Advocated The "Gravamen" Test

The question of whether the phrase "based upon" in the statute means that the commercial activities in the United States must constitute the "gravamen" of the action, as opposed to "one element" of a claim, was squarely presented in *Nelson*. In the Brief of the United States As Amicus Curiae Supporting Petitioners filed in the *Nelson* case ("*Nelson* Amicus Curiae Brief"), the United States argued against a "one element" test and endorsed the "gravamen" analysis. *Nelson* Amicus Curiae Brief, at 15, *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (No. 91-522) (contending that "based upon" language requires that a court consider the gist or gravamen of the action and not a single element). As the United States maintained, "In other words, the commercial activity must be the basis for the cause of action and not, for example, simply a link in the chain of events that led to an overseas injury." *Id.* at 10.[2]

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[2] *See Nelson* Amicus Curiae Brief at 15 ("Applied according to its defined meaning, the term 'based upon' requires that the foreign state's commercial activity be the 'basis' for—and not merely related to—the cause of action. *See Webster's Third New International Dictionary* 180-181 (1986) (defining the verb "base"); *accord Random House Dictionary* 172 (1987). The specific language requires that the commercial activity provide the foundation for the plaintiff's action. *See Black's Law Dictionary* 128 (5th ed. 1979). The commercial activity must supply the 'gist' or 'gravamen' of the plaintiff's complaint. *See id.* at 620, 631; *accord Webster's Third New International Dictionary* 959, 992 (1986); *Random House Dictionary* 959, 992 (1986)."); *see also American*

The United States stated that there was no question Congress intended to give "based upon" its natural meaning. The United States urged that, if Congress had intended a 'link' or 'element'—a "conceptually different and far less significant relationship"—to vitiate a foreign sovereign's immunity, it would not have said "based upon." *Id.* at 15-16.

Nelson recognizes the United States' argument as to Congressional intent and thus establishes that only cases where the "gravamen" or the essence of a case is commercial activity in the United States satisfy the "based upon" requirement prescribed by the FSIA.[3]

B. The Conflict Is In Direct Opposition To The FSIA Policy Of Creating Uniformity In The Application Of Foreign Sovereign Immunity

The application of the foreign sovereign immunity doctrine, as codified in the FSIA, is of vital importance to the nation's political and economic interests and policies. The FSIA sets forth the scope of and exceptions to foreign sovereign immunity, representing Congress' best judgment, based on its balancing of the appropriate interests, as to when foreign states should and should not be immune from the jurisdiction of courts in the United States. Congress' enactment of the FSIA was also intended to serve the important goal of ensuring uniformity in the courts' determinations of immunity of foreign sovereigns to suit in the United States. Prior to the enactment of the FSIA, the lack of uniformity in these determinations created ongoing difficulties for the State

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Heritage Dictionary 111 (1981) (definition of "basis": "1. A foundation upon which something rests. 2. The chief ingredient or most stable component of anything; fundamental ingredient"); *accord Compact Oxford English Dictionary* 979 (2d ed. 1996); Compact Oxford English Dictionary 701 (2d ed. 1996) ("gravamen" is "the particular part of an accusation that bears most heavily on the accused").

[3] In light of the previously stated position of the United States in *Nelson*, the Court may wish to invite the views of the Solicitor General.

Department and our nation's foreign policy. H.R. Rep. No. 94-1487, at 6-9; 15 Moore's Federal Practice § 104.03 (2002) ("[The FSIA's] primary goal was to abandon the unpredictable case-by-case approach to foreign sovereign immunity in favor of a system in which decisions were to be made on purely legal grounds under procedures that ensured due process."); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

The circuit conflict concerning the appropriate interpretation of "based upon" is precisely the type of inconsistency the FSIA intended to avoid. Such inconsistency has direct implications with regard to comity among foreign states, as recognized by the United States. These concerns demand that foreign states be subject to clear standards to prevent such unpredictability of outcomes and potential for strategic forum shopping.

IV. THE "ONE ELEMENT" TEST IS AN ERRONEOUS INTERPRETATION OF THE FSIA

A. The "One Element" Test Is Contrary To This Court's Opinion In *Nelson*

As noted above, the Court in *Nelson* quoted approvingly the language of a lower court holding that the "based upon" language requires that the activity in the United States constitute the "gravamen" of the claim. *Nelson* also rejected the notion that a "link" to the United States would be sufficient to establish the commercial activity exception. In contrast to the court of appeal's statement that "BP's claim satisfies the required nexus with the United States because the claim is *linked* to Sopo's procurement activities in the United States" (App. at 10a (emphasis added)), in *Nelson* this Court held:

> Congress manifestly understood there to be a difference between a suit "based upon" commercial activity and one "based upon" acts performed "in connection with"

> such activity. The only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity.

507 U.S. at 358. In order to invoke the commercial activity exception, a plaintiff must show that the "gravamen" of his cause of action consists of commercial activities in the United States. The Court's analysis in *Nelson* demonstrates an intention not to cause a foreign state to lose its sovereign immunity simply because the plaintiff can show some technical or formal "hook" tying the commercial activities in the United States to his cause of action. Instead, foreign sovereigns will be subjected to jurisdiction when those activities form the "gravamen" of the action. *Nelson*, 507 U.S. at 357-358.

B. The "One Element Test" Is Vulnerable To Manipulative Pleading In Order To Avoid A Finding That A Foreign State Is Immune

The "one element" test is particularly pernicious as it leads to the possibility of artful pleading. Under the "one element" test, claims need only be crafted to aver that an element of any claim occurred in the United States, irrespective of the cause of action at issue and the significance of the element to the claim, in order to vitiate a foreign sovereign's presumptive immunity. Such claim manipulation is flatly inconsistent with this Court's admonishment in *Nelson* that sovereign immunity should not be pierced by semantic ploys of pleading. *Nelson*, 507 U.S. at 363 (holding that a plaintiff's attempt to recast its claim so as to achieve jurisdiction is a "semantic ploy" that should not be countenanced. The Court further held that "[t]o give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose.") *Id.*

The vulnerability of the "one element" standard to claim manipulation thus risks exacerbating the lack of uniformity among courts in the application and adjudication of sovereign immunity under the FSIA. A "one element" standard would

encourage the protraction of litigation against foreign states, in direct contravention of the FSIA policy of adjudicating sovereign immunity at the outset to minimize the burden and expense imposed on foreign sovereigns brought into court in the United States. *Verlinden B.V.*, 461 U.S. at 493.

V. THIS CASE IS A GOOD VEHICLE FOR THE COURT TO CLARIFY ITS DIRECTION ON THE "GRAVAMEN" TEST FOR THE COMMERCIAL ACTIVITY EXCEPTION

This case presents a textbook example of the difference between applying a "gravamen" test in the definition of "based upon" and applying a "one element" test. The district court applied the former, and concluded that the commercial activity exception did not apply; the court of appeals applied the latter and concluded that it did. Some commercial activity in this case was in fact connected to the United States, but the district court concluded that it was not particularly important to BP's basic claim. It was not the gravamen of the claim—or, "the particular part of an accusation that bears most heavily on the accused." Compact Oxford English Dictionary 674, 701 (1996). The court of appeals, on the other hand, did not dispute the district court's conclusion that the activities in the United States did not constitute the "gravamen" of the claim but determined that the alleged disclosure in the United States was technically an element of BP's claim and that was sufficient for purposes of the commercial activity exception.

The district court, following *Nelson,* focused on the "gravamen" of BP's claim, or what BP's basic grievance was:

> The Court [in *Nelson*] concluded that "the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." [*Nelson*, 507 U.S. at 357.] In other words,

> a court must focus on the gravamen of the complaint in determining whether the cause of action is "based upon" commercial activity in the United States.

(App. at 24a-25a.)

The "gravamen" of an action is not synonymous with *any* "element" of an action, but is "the substantial point or essence of a claim, grievance, or complaint." Black's Law Dictionary at 708 (7th ed. 1999). That is what the district court looked to:

> Similarly, in this case, although SPECO engaged in procurement activity in the United States which led to the conduct that eventually injured BP, this activity in the United States is 'not the basis' of BP's suit. At its core, this lawsuit concerns Sopo's acquisition of BP's technology in an unknown place[4] and Sopo's commercial exploitation of that technology in China.

(App. at 25a.)

Here, even if one considers only the allegations of BP's complaint, the action's "substantial point or essence" is that, based on events in Asia, Sopo stole or otherwise came under a duty of non-disclosure with respect to alleged BP trade secrets, and is now using them to produce and sell acetic acid in China. The allegation that Sopo stole or otherwise came under a duty of non-disclosure is the condition precedent to any claim of "illegal disclosure" in the United States. As the district court pointed out, "[f]or BP to prevail on a misappropriation theory [of illegal disclosure], it would also have to show that Sopo acquired the information in an unlawful manner." (App. at 27a.) Likewise, it is the alleged *use* of the trade secrets in China that is what BP claims is causing it

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[4] "An unknown place," but most likely China or Taiwan, as the district court noted: "In this case, there is no evidence, circumstantial or otherwise, that Sopo acquired BP's technology within the United States. As previously noted, all evidence suggests that Sopo acquired the information from a Chinese or a Taiwanese source." (App. at 28a.)

harm, not the disclosure *per se* in the United States. Indeed, BP would have *exactly* the same grievance if none of Sopo, SPECO, or its subcontractors ever did a thing in the United States.

BP's repeated insistence that its claim is not for illegal acquisition of the trade secrets but instead for illegal "disclosure" amounts to nothing more than an attempt to make words camouflage reality. The court of appeals stated, "BP might have chosen to pursue theft-type claims against Sopo, but BP elected *not to do so* and that strategic, legal choice is well within BP's discretion as the master of its complaint." (App. at 9a (emphasis added).) That statement, however, ignores what BP explicitly conceded in its argument to the court of appeals—that it "chose" not to assert a claim for unlawful acquisition because "[I]f we [BP] were in fact suing to shut down SOPO's [allegedly] infringing Chinese plant, or for market damages in China, *then U.S. procurement activities might well be characterized as incidental to those claims*." (BP App. Br. at 9 (emphasis added).) BP cannot eradicate the fundamental fact that any claim it asserts for illegal disclosure in the United States is "based upon" a duty of non-disclosure that arose, if ever, in Asia.

* * * *

In the wake of the Court's decision in *Nelson*, the courts of appeal have struggled and divided over the "based upon" standard under the commercial activity exception, creating marked inconsistency in application of foreign sovereign immunity among the circuits. In light of this climate of confusion and the critical importance of consistency to FSIA policy objectives, this case offers this Court the opportunity to resolve this pressing question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 9, 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

[Filed April 3, 2002]

Nos. 01-2738, 01-2894.

BP CHEMICALS LTD., an English corporation,
Appellant,

v.

JIANGSU SOPO CORPORATION (Group) Ltd., also known as Jiangsu Sopo (Group) Corp., also known as Jiangsu Sopo (Group) Co. Ltd.; Zhenjiang Chemical Plant, a wholly owned subsidiary of Jiangsu Sopo Corporation (Group) Ltd., Appellees, Shanghai Petrochemical Engineering Co., also known as Shanghai Petro-Chemical Engineering Corporation,
Defendant.

Submitted: Feb. 13, 2002
Rehearing and Rehearing En Banc Denied: May 22, 2002

Before: WOLLMAN, RICHARD S. ARNOLD and BYE, *Circuit Judges*.

BYE, *Circuit Judge*.

This action between an English plaintiff and Chinese defendants requires us to navigate a jurisdictional minefield. BP Chemicals Ltd. sued Jiangsu Sopo Corporation (Sopo) alleging violations of the Lanham Act, the International Convention for the Protection of Intellectual Property, the Missouri Uniform Trade Secrets Act and Missouri common law. Sopo claimed immunity from suit under the Foreign

Sovereign Immunities Act of 1976 (FSIA), Pub.L. No. 94-583, 90 Stat. 2891, because it is owned by the government of the People's Republic of China. The district court agreed and dismissed BP's action for lack of subject matter jurisdiction. *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 144 F. Supp. 2d 1140 (E.D. Mo. 2001). We reverse the district court's decision and remand for further proceedings.

I

A few words about the procedural posture of this case are appropriate at the outset of our discussion, for that posture regulates our consideration of the facts. Sopo moved to dismiss BP's action on several grounds soon after an amended complaint was filed in October 2000. Sopo contended the district court lacked subject matter jurisdiction, personal jurisdiction, and should dismiss the action under the *forum non conveniens* doctrine. In this appeal, we consider only Sopo's challenge to the district court's subject matter jurisdiction, which we construe as a facial, not factual, challenge because Sopo limited its attack to the allegations in BP's amended complaint. *See Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990) (explaining the difference between facial and factual jurisdictional challenges).

We observe that the parties presented the district court with a robust evidentiary record from which competing accounts of the underlying events can be discerned. It may seem odd, then, that we construe Sopo's motion as a facial jurisdictional challenge. Having closely examined the record, however, we believe the parties proffered affidavits, testimony, and documentary materials to assist the district court in deciding the ancillary issues presented in Sopo's motion, questions of personal jurisdiction and *forum non conveniens*. The portion of Sopo's motion devoted to subject matter jurisdiction does not draw upon facts presented in the evidentiary record. JA 480-92. Instead, Sopo contested the district court's

subject matter jurisdiction by arguing the allegations in BP's amended complaint failed to erode its presumptive foreign sovereign immunity. The district court tracked Sopo's facial challenge and did not make findings of fact pertinent to establishing subject matter jurisdiction. The manner in which the district court resolved Sopo's motion obliges us to accept as true the allegations in BP's amended complaint, *Titus v. Sullivan,* 4 F.3d 590, 593 (8th Cir. 1993), so we will not delve into possible disputes of fact brought to our attention in the parties' appellate briefs.

II

BP's amended complaint reveals that this action stems from its interest in certain trade secret practices and technologies. In 1986, BP acquired Monsanto Corporation's proprietary interests in the methanol carbonylation process for making acetic acid, a chemical used in making paints, plastics, resins, pharmaceutical and agrochemical products. That process entails a combination of special design features and exotic metals that cannot be found in standard texts or design manuals. BP retains trade secret interests in these combinations, features, and technologies used to design and operate an acetic acid-producing plant employing this process.

BP has licensed its trade secrets worldwide, enabling other companies to build acetic acid production plants using the methanol carbonylation process. To build those plants, BP and its licensees often relied upon outside engineering firms (vendors) to produce high-alloy equipment and other intricate components. It appears that many of these vendors operated in the United States. The vendors operated at all times under strict, contractual duties to maintain the secrecy of BP'S methods and technologies during and after the construction process.

In the mid-1990s—the amended complaint is not specific—BP learned that Nooter Corporation in St. Louis, a vendor, had been asked to manufacture high- alloy equipment in connection with an acetic acid plant under construction in China. Through its own investigation, BP learned that other American vendors had received similar product specifications and directions to prepare materials needed in building an acetic acid plant. Those product specifications closely resembled trade secrets developed by Monsanto and BP. In some instances, the specifications disclosed to American vendors replicated typographical errors in original BP documents.

BP's investigation traced the disclosures to Sopo and Shanghai Petrochemical Engineering Company (SPECO), another government-owned business. Sopo allegedly worked in concert with SPECO to build the "921 plant" in China using BP's trade secret designs. BP believes SPECO acted as Sopo's purchasing agent by procuring sophisticated engineering products and equipment in the United States for Sopo to use in constructing the 921 plant. BP claims SPECO disclosed BP's trade secrets to American vendors to permit them to assess the cost and feasibility of manufacturing the requested components. SPECO also apparently signed contracts with several vendors to manufacture components used to build the 921 plant.

In February 1999, BP filed this action against Sopo, SPECO, and Nooter. BP quickly settled its claims against Nooter and SPECO defaulted. When Sopo moved to dismiss BP's complaint on the grounds mentioned above, BP opposed the motion and, in the alternative, moved to file a second amended complaint and to conduct additional discovery in China pertaining to jurisdictional facts. The district court reasoned Sopo was immune from suit in federal court under the FSIA and dismissed BP's action for lack of subject matter jurisdiction. The district court declined to reach Sopo's

alternative personal jurisdiction and *forum non conveniens* arguments; the district court also denied BP's motion to amend its complaint and its request for further jurisdictional discovery. BP now appeals from these adverse decisions.

III

From the earliest days of our Republic, courts have distinguished between the public and private acts of government. *See Bank of the United States v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907-908, 6 L.Ed. 244 (1824). Public acts, such as punishing criminals and printing money, emanate from the power inherent in sovereignty. Private acts, such as commercial transactions, are not unique to government and could be performed by an individual. Jurisdictional consequences flow from this distinction between public and private acts. A nation is generally immune from suit in another nation's courts in matters arising from its public or sovereign acts, but not its private or commercial acts. *Saudi Arabia v. Nelson,* 507 U.S. 349, 359-60, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993); Restatement (Third) of the Foreign Relations Law of the United States § 451 (1987). The FSIA endorsed this understanding of sovereign immunity: a foreign sovereign is presumptively immune from suit in federal court, 28 U.S.C. § 1604, but this presumption erodes when the suit concerns the sovereign's commercial activities and transactions, *id.* §§ 1602, 1605(a)(2).

Sopo is considered a "foreign sovereign" because it is owned by the government of the People's Republic of China. *See id.* § 1603(a)-(b). Though Sopo is ostensibly immune from suit, BP believes the district court possessed subject matter jurisdiction because its action satisfied two of the FSIA's three commercial activity exceptions that deprive a foreign sovereign of its immunity from suit. The district court disagreed, holding it lacked jurisdiction because BP's

action fit neither exception. We review the district court's decision de novo. *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1380 (8th Cir.1993).

Our review concentrates upon the first commercial activity exception, which vitiates a foreign sovereign's immunity in an action "based upon a commercial activity carried on in the United States." 28 U.S.C. § 1605(a)(2). This plain statutory language naturally lends itself to analysis in two parts. To rebut a foreign sovereign's presumption of immunity, a plaintiff's action must be (1) based upon (2) a commercial activity carried on in the United States. *See id.* BP contends its action meets both elements of this exception and thereby eliminates Sopo's presumptive immunity, a contention we shall explore in detail below.

A

The FSIA contains no definition of "based upon," so we must accord that phrase its plain and ordinary meaning in interpreting the statute. *Nelson*, 507 U.S. at 357, 113 S.Ct. 1471. "[A] claim is 'based upon' events in the United States if those events establish a legal element of the claim . . . . An action is based upon the elements that prove the claim, no more and no less. If one of those elements consists of commercial activity within the United States or other conduct specified in the Act, this country's courts have jurisdiction." *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) (cited approvingly on this point in *Nelson*, *supra*). We emphasize that only one element of a plaintiff's claim must concern commercial activity carried on in the United States. "The entire case need not be based on the commercial activity of the defendant." *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000).

Because our task is to discern whether any of BP's claims (or any elements of those claims) are based upon commercial activity carried on in the United States, we turn our attention

first to BP's amended complaint. The amended complaint includes a formidable array of claims with roots in state law, federal law, and international law. We need not consider each of these claims separately, since only one claim or element of a claim need concern commercial activity in the United States to erode Sopo's presumptive immunity. Following BP's lead, we train our focus upon its state law claims that Sopo misappropriated BP trade secrets. In particular, according to Count III of the amended complaint, Sopo violated the Missouri Uniform Trade Secrets Act (MUTSA) by improperly disclosing BP's trade secrets to numerous American vendors without BP's express or implied consent, while Sopo knew or should have known the trade secrets were stolen or were derived from a person owing a duty to maintain their secrecy. JA 400-402.

The Missouri legislature adopted the MUTSA in 1995. The MUTSA—like nearly every set of state trade secret laws—derives from the Uniform Trade Secrets Act, first promulgated by the National Conference of Commissioners on Uniform State Laws in 1979. The Uniform Act provides that misappropriation of trade secrets may occur in any of three forms: improper acquisition, disclosure, or use. Its Prefatory Note explains that liability for misappropriation exists when "either a person's acquisition of the trade secret, disclosure of the trade secret to others, or use of the trade secret [is] improper." 14 *Uniform Laws Annotated* 434 (West 1990).

The MUTSA generally follows the Uniform Act by acknowledging these alternative forms of misappropriation, though the MUTSA lumps improper disclosure and use into a single category. Thus, the MUTSA defines misappropriation to take two forms:

> (a) Acquisition of a trade secret of a person by another person who knows or has reason to know that the trade secret was acquired by improper means; or

(b) Disclosure or use of a trade secret of a person without express or implied consent by another person who:

a. Used improper means to acquire knowledge of the trade secret; or

b. Before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake; or

c. At the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was:

i. Derived from or through a person who had utilized improper means to acquire it;

ii. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

iii. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.

Mo. Stat. § 417.453(2). A recent decision from a district court within our circuit cogently explains the two forms of misappropriation recognized by the MUTSA.

> The first is when one acquires a trade secret through "improper means," that is, through such means as theft, bribery or inducing one to breach a duty of secrecy. *Id.* § 417.453(2)(a) . . . . The second example of misappropriation occurs when one disclosing a trade secret without consent, *inter alia,* knew or had reason to know that the secret was "[a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use." *Id.* § 417.453(2)(b)c.(ii).

H & R Block E. Tax Servs., Inc. v. Enchura, 122 F. Supp. 2d 1067, 1074 (W.D. Mo. 2000). Applying similar state law,

we have previously recognized these alternate means of proving misappropriation, *Sip-Top, Inc. v. Ekco Group, Inc.*, 86 F.3d 827, 833 (8th Cir. 1996) (defining misappropriation of trade secrets under Minnesota law as either "(1) improper acquisition of a trade secret; or (2) disclosure or use of a trade secret without consent"), as have other circuits, *e.g.*, *Sokol Crystal Prods., Inc. v. DSC Communications Corp.*, 15 F.3d 1427, 1429 (7th Cir. 1994) (same); *accord DTM Research, L.L.C. v. AT & T Corp.*, 245 F.3d 327, 332 (4th Cir. 2001); *Nora Beverages, Inc. v. Perrier Group of Am., Inc.*, 164 F.3d 736, 750 (2d Cir. 1998).

BP has elected to pursue a misappropriation claim against Sopo stemming from Sopo's purported wrongful *disclosure* of BP trade secrets to American engineering firms. BP might have chosen to pursue theft-type claims against Sopo, but BP elected not to do so and that strategic, legal choice is well within BP's discretion as the master of its complaint. It may be true that many misappropriation claims arise when one party steals another's trade secret. Such theft is often followed by disclosure, as the thief attempts to cash in on his ill-gotten gains. In that case, we believe the MUTSA permits a trade secret holder to pursue both theft and disclosure claims for misappropriation. One type of claim does not preclude the other. Our review of trade secret law confirms that the MUTSA is hardly novel in this respect: a plaintiff may premise his misappropriation claim on any or all of these alternate forms of improper conduct.

We believe BP's disclosure-type MUTSA claim is "based upon" Sopo's commercial activity carried on in the United States. The claim requires BP to prove Sopo disclosed BP's trade secrets to others without consent, while having reason to know the trade secrets were acquired under circumstances giving rise to a duty to maintain their secrecy. *See* Mo.Stat. § 417.453(2)(b)(c). In the course of proving that claim, BP says it will demonstrate Sopo disclosed BP's trade secrets to

American vendors in the United States while procuring equipment to fabricate the 921 plant. BP's MUTSA claim satisfies the required nexus with the United States because the claim is linked to Sopo's procurement activities in the United States. Therefore, we have little difficulty concluding that an element of BP's claim is based upon events transpiring in the United States—Sopo's disclosures to American vendors.

Both Sopo and the district court disagree with our line of reasoning, but for slightly different reasons. Sopo contends BP's reliance on *disclosure* to American vendors is immaterial to BP's misappropriation claim and that BP's claim actually turns on whether Sopo's *acquisition* of BP trade secrets was tortious. Appellee's Brief 20. (Sopo urges this distinction because it claims BP's trade secrets were stolen outside the United States, hence BP's action would not concern commercial activities in the United States.) Sopo appears to argue that the MUTSA does not provide a misappropriation cause of action based entirely upon improper disclosure, but rather requires every trade secret plaintiff to prove the defendant stole its proprietary information—a contention we have rejected in the preceding discussion. We believe the MUTSA provides for misappropriation claims based upon wrongful disclosure of trade secrets, and we conclude Sopo's disclosure of trade secrets lies at the very heart of BP's action.

Unlike Sopo, the district court acknowledged BP could ground a misappropriation claim upon Sopo's wrongful disclosures in the United States. But the district court believed BP's reliance on a disclosure theory was merely a "semantic ploy" because BP's true claim was captured by a theft theory. "At its core, this lawsuit concerns Sopo's acquisition of BP's technology in an unknown place and Sopo's commercial exploitation of that technology in China." *BP Chems.*, 144 F. Supp. 2d at 1144. The district court effectively recast BP's misappropriation claim under the

rubric of theft, rather than wrongful disclosure. And because Sopo's alleged theft likely occurred outside the United States, the district court held BP's misappropriation claim was not "based upon" commercial activity occurring in the United States.

The district court's reference to a semantic ploy derives from *Nelson,* in which the Court rejected a plaintiff's artful attempt to refashion an intentional tort claim as a negligent failure to warn claim. 507 U.S. at 363, 113 S.Ct. 1471 ("For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of fai'ure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it."). *Nelson* refused to consider the failure to warn claim as a proper basis for proving a foreign sovereign's contacts with the United States.

Nelson's "semantic ploy" discussion requires delicate handling. One might read the Court's discussion as extending to a district judge broad discretion to recast a plaintiff's claims to fit the judge's understanding of the case. Yet we can scarcely imagine the Court intended that result. Such an expansion of judicial power is at loggerheads with liberal notice pleading rules and our settled understanding that a plaintiff is the master of his complaint. The repercussions of this interpretation of the "semantic ploy" discussion are simply too severe for us to accept it as the Court's intended meaning.

Rather, it appears the Court fixed its sights on a slightly different target—the legal merits of the underlying claim. The Court's discussion suggests a plaintiff may not premise the absence of sovereign immunity upon a legally invalid claim. Some of the dissenters in *Nelson,* who attacked the semantic ploy discussion with gusto, apparently understood the Court's discussion in these terms. 507 U.S. at 373, 113 S.Ct. 1471 (Kennedy, J., dissenting) ("The Court's summary

treatment may stem from doubts about the underlying validity of the negligence cause of action."). *Nelson* described the absurdity of the plaintiff's claim that a foreign sovereign bore him a duty to warn of its indulgence in intentionally tortious conduct. The absurdity of Nelson's claim had a legal (not factual) dimension for there is generally no claim of negligence that flows from intentionally tortious conduct. *See* Restatement (Second) of Torts § 282 cmt. d (1965); *see also United Nat'l Ins. Co. v. Tunnel, Inc.*, 988 F.2d 351, 353 (2d Cir. 1993) (recognizing the "mutual exclusivity of negligence and battery"); *Hockensmith v. Brown*, 929 S.W.2d 840, 845 (Mo. Ct. App. 1996) ("The theories of negligence and intentional tort are contradictory and mutually exclusive."). As a matter of law, Nelson's failure to warn claim was apparently invalid because it rested upon the sovereign's performance of intentionally tortious acts. Thus, we glean from *Nelson* the principle that a plaintiff may not undo a foreign sovereign's immunity simply by pleading a legally untenable claim whose elements would happen to demonstrate the sovereign's contacts with the United States.

Interpreted in this fashion, *Nelson's* semantic ploy doctrine does no violence to our settled expectations. In fact, the approach finds a home in the Court's ongoing oversight of federal court jurisdiction. We perceive an implicit analogy between this aspect of *Nelson* and the venerable doctrine that a plaintiff may not defeat a defendant's right of removal based upon diversity of citizenship jurisdiction by fraudulently joining a non-diverse defendant. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-99, 42 S.Ct. 35, 66 L. Ed. 144 (1921). We recently explained that "[j]oinder is fraudulent and removal is proper when there exists no reasonable basis in fact and law supporting a claim against the resident defendants." *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 871 (8th Cir. 2002). Thus, fraudulent joinder forbids a plaintiff from *avoiding* a federal court by raising a claim devoid of legal merit; the semantic ploy doctrine

forbids a plaintiff from *remaining* in a federal court by asserting a dubious legal claim. The doctrines occupy opposite poles of the jurisdictional globe. Both protect the integrity of our jurisdiction by ensuring it is neither expanded nor retracted by sham pleadings.

It is obvious that *Nelson's* semantic ploy doctrine has no application in this case. The failure to warn claim in *Nelson* was a facially-invalid tort and was therefore dissimilar to BP's wrongful disclosure misappropriation claim rooted in the precise words of a Missouri statute. BP has elected to pursue a misappropriation claim under a disclosure theory and we believe that course of action is BP's legal and strategic prerogative. For this reason, BP's misappropriation claim does not compare to Nelson's legally invalid failure to warn claim. The district court failed to heed the importance of BP's choice of misappropriation theory and improperly invoked the specter of *Nelson's* semantic ploy doctrine. Contrary to the district court's holding, BP's action is indeed "based upon" commercial transactions that occurred within the United States.

B

BP has satisfied the first element of the commercial transaction exception we identified above, so we turn to the second element—"a commercial activity carried on in the United States." The FSIA defines this phrase to mean "commercial activity carried on by [a foreign] state and having substantial contact with the United States." 28 U.S.C. § 1603(e). This definition has two parts. First, there must be *commercial activity,* which the FSIA further defines as "either a regular course of commercial conduct or a particular commercial transaction or act." *Id.* § 1603(d). Second, that commercial activity must have *substantial contact* with the United States. We believe Sopo's alleged contacts with American vendors satisfy both parts of this definition.

1

Sopo does not seriously question the commercial character of its alleged acts, and wisely so. Sopo's attempts (through its agent SPECO) to contact American vendors to produce goods needed to build the 921 plant were obviously "commercial" in character. Prior cases suggest that a foreign state's contract to buy equipment from an American manufacturer constitutes a "commercial activity" within the meaning of the statutory exception. *E.g., McDonnell Douglas Corp. v. Islamic Republic of Iran,* 758 F.2d 341, 349 (8th Cir. 1985); *accord Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines,* 965 F.2d 1375, 1384-85 (5th Cir. 1992) (collecting cases and opining that contracts for the procurement of goods and services typically satisfy the commercial activity requirement in the FSIA); Restatement (Third) of the Foreign Relations Law of the United States § 453 cmt. b (1987) ("An activity is deemed commercial . . . if it is concerned with production, sale, or purchase of goods . . . ."). These authorities readily confirm that Sopo's recruitment of American vendors to manufacture products for its 921 plant was "commercial activity."

2

We likewise believe Sopo's efforts to obtain the fruits of American engineering know-how constitute "substantial contact" with the United States.

At the margins, defining the term "substantial contact" has proven difficult. The District of Columbia Circuit has suggested that proof of substantial contact requires more than the minimum contacts sufficient to satisfy due process in establishing personal jurisdiction. *Maritime Int'l Nominees Establishment v. Republic of Guinea,* 693 F.2d 1094, 1109 n. 23 (D.C. Cir. 1983). Perhapsfor this reason, courts have been reluctant to declare single visits to the United States by representatives of foreign sovereigns to constitute substantial

contact. *E.g., Soudavar v. Islamic Republic of Iran,* 186 F.3d 671, 674 (5th Cir.1999), *cert. denied,* 528 U.S. 1157, 120 S.Ct. 1165, 145 L. Ed. 2d 1076 (2000). Even two visits have not always been deemed substantial contact. *Maritime Int'l Nominees,* 693 F.2d at 1109.

We are not faced with a single- or double-visit case, however, nor must we resolve a case of comparable difficulty. Contacts much more significant than isolated visits should, we believe, satisfy the FSIA's requirement. For example, "[s]olicitation of business within the United States is generally a sufficient nexus" to meet the substantial contacts test. 15 *Moore's Federal Practice* ¶ 104.12[2][c][ii] (Matthew Bender 3d ed.2001); *see also In re Papandreou,* 139 F.3d 247, 253 (D.C. Cir. 1998) ("[O]ur cases do not foreclose the possibility that some degree of solicitation in the U.S. might satisfy the 'substantial contact' requirement.").

In this case, BP alleges Sopo (through its agent, SPECO) solicited business from vendors in the United States on an ongoing basis. A foreign state can surrender its immunity by virtue of activities committed by its agent, *Maritime Int'l Nominees,* 693 F.2d at 1105-1107, but Sopo contends this principle does not apply here because SPECO was not its agent. And because BP's proof of substantial contact rests entirely upon the agency allegations, Sopo contends BP cannot meet the substantial contact requirement. Sopo therefore posits SPECO's American contacts cannot be used to hale it into federal court.

BP's amended complaint pleads an agency between Sopo and SPECO. According to that complaint, SPECO procured essential materials from American vendors on Sopo's behalf. Without these materials, BP contends, Sopo could not have copied BP's trade secret designs and constructed an acetic acid plant in China. It may fairly be inferred from BP's amended complaint that SPECO's contacts with American

firms were regular and sizeable in number. We therefore believe BP's allegations amply support Sopo's substantial contact with the United States.

Sopo acknowledges, as it must, that BP's amended complaint plainly alleges SPECO operated as its American purchasing agent. But Sopo contends BP has not pleaded this agency relationship with particularity, as is required by federal law. We find little support for Sopo's contention that allegations of agency are subject to heightened pleading standards. Federal Rule of Civil Procedure 9(b) requires allegations of "fraud or mistake" to be pleaded with particularity, but allegations of agency are not mentioned in the text of this Rule. In our view, the Rule's silence is meaningful, for the Supreme Court recently refused an invitation to extend Rule 9(b)'s heightened pleading standard beyond the two categories enumerated in the Rule. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, ——- - ——, 122 S.Ct. 992, 998-99, 152 L.Ed.2d 1 (2002).

We are cognizant of cases requiring plaintiffs to allege the existence of an agency with particularity, but the heightened pleading requirement in these cases stems from the connection between the agency and allegations of fraud. "[W]hen theplaintiff relies upon the same circumstances to establish both the alleged fraud and the agency relationship of a defendant, the reasons for more particularized pleading that animate Rule 9(b) apply with equal force to the issue of agency and to the underlying fraud claim." *Lachmund v. ADM Investor Servs., Inc.*, 191 F.3d 777, 783 (7th Cir. 1999); *cf. Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 916 (8th Cir. 2001) (assuming, without deciding, that "a plaintiff seeking to hold a principal liable for an agent's fraud must plead not only fraud but also agency with particularity"). These cases are of no value in resolving the present dispute because BP has not alleged fraud in its amended complaint. Even under the rationale propounded in the cases cited

above, BP would not have been obliged to plead the Sopo-SPECO agency relationship with particularity in its amended complaint.

BP's amended complaint is replete with allegations that SPECO acted as Sopo's agent. These allegations suffice—at least in the infancy of this litigation—to bring SPECO's conduct into play in analyzing whether Sopo had "substantial contact with the United States." We believe Sopo's contacts were indeed substantial.

We therefore hold Sopo is not immune from BP's suit in federal court because the suit is based upon Sopo's commercial activity carried on in the United States. *See id.* § 1605(a)(2). Because Sopo lacks sovereign immunity, the district court had subject matter jurisdiction and erred in dismissing the action.

C

Sopo devotes much of its brief to alternative grounds for affirmance that the district court declined to address. Sopo argues the district court lacks personal jurisdiction over it; Sopo also argues the doctrine of *forum non conveniens* precludes BP's suit in federal court when the essential controversy arose in China.

The force of these arguments depends entirely upon the facts of the case, facts that have not yet been established by the district court. For example, proper resolution of the *forum non conveniens* argument will depend heavily upon whether BP could receive a fair hearing in the Chinese courts. Both BP and Sopo offered expert witnesses in the district court to testify about the relative quality and independence of the Chinese judiciary. Not surprisingly, these experts' accounts differed. We believe it would be imprudent to address Sopo's alternative arguments bereft of the considered views and factual findings of the district court. We therefore decline to

consider these arguments at this juncture; in so ruling, we wish to make explicit that Sopo may renew these arguments at an appropriate time.

IV

We reverse the judgment of the district court and remand for appropriate further proceedings. BP's additional arguments that the district court should have permitted it to file a second amended complaint and to take further jurisdictional discovery are mooted by our disposition.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. MISSOURI
EASTERN DIVISION

No. 4:99CV323 CDP

BP CHEMICALS LTD.,
Plaintiff,

v.

JIANGSU SOPO CORPORATION, LTD., *et al.*,
Defendants.

May 29, 2001

MEMORANDUM AND ORDER

PERRY, *District Judge*.

This is a trade secret case brought by BP Chemicals Ltd. (BP), a British corporation, under the Missouri Uniform Trade Secrets Act (MUTSA), Missouri common law, § 44(b) and (h) of the Lanham Act, 15 U.S.C. § 1126(b) and (h), and Article 10 bis of the Paris Convention for the Protection of Industrial Property. BP alleges that Chinese defendants Jiangsu Sopo Corporation (Group) Ltd. ("Sopo") and Shanghai Petrochemical Engineering Co. ("SPECO") wrongfully acquired BP trade secrets [1] and ultimately incorporated them into Sopo's acetic acid plant located in China (the "921 plant"). Defendant Nooter Corp., a Missouri corporation,

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[1] The purported trade secrets relate to BP's methanol carbonlyation process for synthesizing acetic acid. This technology has been the subject of other litigation in the United States. *See, e.g., BP Chemicals, Ltd. v. Formosa Chemical & Fibre Corp.*, 229 F.3d 254 (3d Cir. 2000).

manufactured key components of the 921 plant. Sopo and SPECO allegedly sent bid packages and technical specifications containing BP's trade secrets to Nooter and to several other United States companies that also provided equipment or supplies for the plant.[2]

SPECO has defaulted, and BP has reached a settlement agreement with Nooter. Sopo has moved to dismiss, arguing that it is immune from suit under the Foreign Sovereign Immunities Act (FSIA), that this court lacks personal jurisdiction over it under due process principles, and that, under the doctrine of forum non conveniens, China is the appropriate forum for this case. BP has moved to amend its complaint and to compel jurisdictional discovery. I conclude that the FSIA renders Sopo immune from this suit. I also conclude that BP's proposed amendments to its complaint would be futile, and that the discovery BP seeks would not change the jurisdictional problems in this case. Accordingly, I will grant the motion to dismiss and deny BP's motions.

I. *Background*

Sopo wholly owns a small subsidiary in Texas, but otherwise does no business in the United States. It is undisputed that the acetic acid produced by the 921 plant is sold exclusively within the Chinese market.

In 1992, Sopo and SPECO entered into a general contract for the manufacture of the 921 plant. SPECO's responsibilities under the contract included "procurement, manufacturing, testing, and transport of all equipment" for the plant. All supply contracts with Nooter and other United States vendors were executed by SPECO, not by Sopo

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[2] In addition to Sopo, SPECO, and Nooter, the complaints name Zhenjiang Chemical Plant as a defendant. Sopo asserts that it was formerly known by this name, and that Zhenjiang Chemical is not a separate entity from Sopo. BP's pleadings name Zhenjiang Chemical as a wholly-owned subsidiary of Sopo.

itself. There is no evidence that Sopo sent any direct communications to the United States vendors, although Sopo employees visited the vendors in the United States for training and equipment inspections. BP alleges, however, that SPECO was Sopo's agent and that SPECO's contacts with the United States should therefore be attributed to Sopo for jurisdictional purposes. Moreover, BP's proposed second amended complaint adds allegations that Sopo and SPECO conspired with others to misappropriate BP's trade secrets.

The parties have presented little evidence of where Sopo may have acquired BP's trade secrets. What evidence there is, however, strongly points to an acquisition in either China or Taiwan. The Amended Complaint states that "[t]he 921 Project appears to have been modeled on technology from two BP Chemicals licensed projects in Asia: one in Shanghai, PRC, . . . and the other in Taiwan. . . . The [Shanghai] license was issued in 1993 and the [Taiwanese] license was issued in 1980." The Amended Complaint also alleges that "BP Chemicals has documents showing word-for-word copying of . . . material specifications, right down to typographical errors present in both the 921 . . . and Shanghai Wujing . . . project specifications." The Amended Complaint goes on to allege in considerable detail other suspicious similarities between the 921 and the Shanghai and Taiwanese project specifications. The Amended Complaint nowhere suggests that Sopo attained the information from any source other than one in Shanghai or Taiwan. Indeed, the Amended Complaint suggests that some of the technology could not have been acquired from another source. For example, the Amended Complaint alleges that the 921 promoter reactor "is virtually identical to the [Taiwanese project] design in overall length and diameter," and that "[t]he [Taiwanese] promoter reactor was itself an unusual, half-size vessel, which was not duplicated in subsequent [BP] licensed plants."

II. *Discussion*

The FSIA provides the only basis for exercising jurisdiction over a foreign state in the courts of the United States. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993). Under the FSIA, foreign sovereigns are immune from suit in the United States except to the extent that the Act provides otherwise. 28 U.S.C § 1604; *Nelson*, 507 U.S. at 355, 113 S. Ct. 1471. If a foreign state has made a prima facie showing of immunity, the burden is on the party seeking to invoke the court's jurisdiction to show that one of the FSIA's exceptions applies. *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1382 (8th Cir. 1993).

BP does not dispute that Sopo is a presumptively immune "foreign state" under the FSIA. BP argues, however, that the "commercial activities" exception found in 28 U.S.C. § 1605(a)(2) subjects Sopo to this court's jurisdiction. Section 1605(a)(2) provides three circumstances in which a foreign state's commercial activities subject it to jurisdiction in United States courts. A foreign state is not immune from jurisdiction where

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id. BP argues that either of the first two clauses of § 1605(a)(2) provides a basis for jurisdiction over Sopo. Although I do not believe that BP has shown that SPECO was acting as Sopo's agent, I will assume for purposes of this decision that agency exists and that all of SPECO's activities

relating to the 921 plant are attributable to Sopo. I do this because it demonstrates that even if SPECO were Sopo's agent, jurisdiction would still not be proper.

A. *The First Clause of § 1605(a)(2)*

The first clause of § 1605(a)(2) requires that the cause of action be "based upon a commercial activity carried out in the United States." A commercial activity is carried out "in" the United States if the commercial activity has "substantial contact with the United States." 28 U.S.C. § 1603(e). Accordingly, the issues under the first clause of § 1605(a)(2) are whether Sopo engaged in commercial activity having "substantial contact" with the United States, and, if so, whether BP's lawsuit is "based upon" that commercial activity.

The initial step in determining whether the first clause applies is to identify all instances of "commercial activity" that arguably provide a basis for jurisdiction under § 1605(a)(2). *See, e.g., Grossman*, 991 F.2d 1376, 1382-83 (court began its analysis by identifying relevant "commercial activity"). Sopo has engaged in two instances of "commercial activity" that arguably provide a basis for jurisdiction under § 1605(a)(2). First, Sopo engaged in the commercial activity of constructing and operating the 921 plant in China. Secondly, Sopo engaged in the commercial activity of contracting with United States vendors to provide equipment for the 921 plant.

Sopo's construction and operation of the 921 plant cannot serve as the predicate commercial activity under the first clause of § 1605(a)(2) because this commercial activity did not occur "in the United States." In *Grossman*, the Eighth Circuit shed significant light on when a commercial activity occurs "in" the United States for purposes of § 1605(a)(2). *Id.* at 1383. That case arose from a transaction in which Air Canada, a state-owned Canadian corporation, bought Gelco

Express United (Express), a Canadian subsidiary of an American parent. The parties to the sale engaged in one early negotiation session in Minnesota and exchanged letters, faxes, and telephone calls in the United States. In particular, the Canadian accounting firm that audited Express in connection with the sale sent Express's financial statements and a certification of net equity to the American parent. The court nevertheless concluded that the sale transaction did not occur "in" the United States. The court reasoned that the purchase "occurred primarily in Canada" because most negotiations occurred there. *Id.* The accounting firm's act of sending financial documents to the United States was "but one small part of a significant transaction." *Id.*

Likewise, in this case, Sopo's construction of the 921 plant "occurred primarily" in China. Although SPECO contracted with United States vendors and visited the United States in order to procure equipment for the 921 plant, these procurement activities were a relatively small part of the larger process of building the plant. Moreover, Sopo operates the plant in China and sells the acetic acid produced by the plant exclusively within the Chinese market. Sopo's construction and operation of the 921 plant does not amount to commercial activity "in" the United States.

Although SPECO's vendor contracts themselves likely amount to commercial activity occurring in the United States, this commercial activity cannot serve as the predicate for jurisdiction under the first clause of § 1605(a)(2) because this lawsuit is not "based upon" the contracts. In *Nelson*, the Supreme Court explained that the "based upon" terminology requires that the cause of action have a nexus stronger than "a mere connection with, or relation to" commercial activity within the United States. *Nelson*, 507 U.S. at 358, 113 S. Ct. 1471. The Court concluded that "the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357, 113 S. Ct. 1471. In other words, a court must

focus on the gravamen of the complaint in determining whether the cause of action is "based upon" commercial activity in the United States.

In *Nelson*, the Saudi government recruited the plaintiff to work in a hospital in Saudi Arabia. The plaintiff alleged that he was later arrested and tortured by the government in retaliation for his attempts to complain about unsafe conditions in the hospital. The Supreme Court held that, although Saudia Arabia's recruitment of Nelson within the United States "led to the conduct that eventually injured" Nelson, the recruitment was "not the basis" of Nelson's suit. *Id.* The Court reasoned that the plaintiffs "ha[d] not . . . alleged breach of contract . . . but personal injuries caused by [Saudi Arabia's] intentional wrongs" within Saudi Arabia. *Id.*

Similarly, in this case, although SPECO engaged in procurement activity in the United States which led to the conduct that eventually injured BP, this activity in the United States is "not the basis" of BP's suit. At its core, this lawsuit concerns Sopo's acquisition of BP's technology in an unknown place and Sopo's commercial exploitation of that technology in China. Support for this conclusion can be found in *BP Chemicals, Ltd. v. Formosa Chemical & Fibre Corp.*, 229 F.3d 254 (3d Cir. 2000), a case strikingly similar to the present one. In *Formosa Chemical*, like in this case, BP Chemicals alleged that an Asian company had misappropriated its methanol carbonylation process for manufacturing acetic acid. The Asian company had allegedly contracted with United States vendors to supply components of its acetic acid plant. In holding that the personal jurisdiction over the Asian defendant was lacking, the Third Circuit indicated that the gravamen of the lawsuit was unrelated to the United States:

> In this case [the defendant's] alleged misappropriation and improper use of BP's trade secrets have occurred

> and continue to occur in Taiwan. The primary alleged injury to BP has occurred and continues to occur in Great Britain. Thus, the primary tortious conduct giving rise to BP's claim against [the defendant] and to the injury caused thereby is unrelated to the United States.

Id. at 261.

BP attempts in its pleadings to characterize its case as one "based upon" commercial activity in the United States by emphasizing that its trade secrets were disclosed to the United States vendors in the course of SPECO's and Sopo's procurement activities. Yet, the Supreme Court's opinion in *Nelson* reveals that a plaintiff cannot always create jurisdiction under the FSIA merely by crafting his allegations around the defendant's contacts with the United States. In *Nelson*, the complaint included a claim for negligent failure to warn. The gist of this claim was that the Saudi government was negligent in its recruiting activities within the United States in that it failed to warn the plaintiff that he might be subject to imprisonment and torture in Saudi Arabia. The Court rejected this claim as a "semantic ploy," reasoning that a plaintiff could too easily recharacterize any intentional tort claim in this manner. *Nelson*, 507 U.S. 349, 363, 113 S. Ct. 1471, 123 L.Ed.2d 47.

Although this is perhaps a closer case than *Nelson*, I have little difficulty concluding that the alleged disclosures of BP's trade secrets to the United States vendors are not the basis of this lawsuit. Not one of BP's claims would require proof of any of the acts alleged to have occurred within the United States. Although BP claims that the disclosures to the United States vendors constitute unlawful "use" of its trade secrets, Sopo's "use" of the information in manufacturing acetic acid in China is far more central to this case than its "use" of the information in the course of its procurement activities. I note in this regard that some of the United States vendors apparently already possessed the BP technology as a result of

having supplied equipment for other acetic acid plants. I also note that BP has presented no evidence that United States vendors have unlawfully disclosed the technology to others, or that there is any significant risk that they will do so.

B. *The Second Clause of § 1605(a)(2)*

The second clause of § 1605(a)(2) requires that the suit be based upon "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." My conclusion that this case is not "based upon" Sopo's procurement activities in the United States disposes of BP's argument that this clause applies; BP has identified no other "act" of Sopo's within the United States that could provide a basis for this lawsuit.

I note also that the Eighth Circuit in *General Electric* indicated that the second clause can only be invoked when defendants' acts within the U.S. "in and of themselves are sufficient to form the basis of a cause of action." *General Electric*, 991 F.2d at 1384 (citing *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988)). This language seems to mean that in order for the second clause to apply, the facts establishing all elements of the plaintiff's claim must have occurred within the United States.

Contrary to BP's assertion, Sopo's activities within the United States are not sufficient to establish a cause of action. All that Sopo allegedly did in the United States was disclose BP's trade secrets to the United States vendors. This act if proved would not itself establish a trade secret misappropriation. For BP to prevail on a misappropriation theory, it would also have to show that Sopo acquired the information in an unlawful manner. *E.g. BP Chemicals, Ltd. v. Baloun*, No. 4:98CV932 RWS (E.D. Mo. Oct. 11, 2000) (holding that a "misappropriation" under Mo.Rev.Stat. § 417.450(b)(a) requires both an improper acquisition and ultimate disclosure); Restatement of Torts § 757(a) (1939) (stating that

the critical inquiry is whether the defendant obtained the secret by "improper means"). Although the general rule is that a plaintiff may prove improper acquisition by way of circumstantial evidence, *e.g. Pioneer Hi-Bred Int'l v. Holden Foundation Seeds, Inc.*, 35 F.3d 1226, 1239 (8th Cir.1994), this rule in no way absolves the plaintiff of the burden to prove this element.

In this case, there is no evidence, circumstantial or otherwise, that Sopo acquired BP's technology within the United States. As previously noted, all evidence suggests that Sopo acquired the information from a Chinese or a Taiwanese source. Accordingly, even if the first clause of § 1605(a)(2) were applicable to this case, the second clause would nevertheless be inapplicable because Sopo's acts within the United States are not sufficient to form the basis of a cause of action. I will grant Sopo's motion to dismiss.

C. *BP's Motion to Amend*

BP's proposed second amended complaint makes three significant changes. First, it adds as a defendant Shanghai Sopo Chemical Design Engineering Co., Ltd. (Sopo Engineering), which BP alleges is a subsidiary of defaulting defendant SPECO. Secondly, it adds a cause of action for conspiracy under Missouri common law. Thirdly, it eliminates defendant Nooter, with whom it has settled.

Rule 15(a), Fed. R. Civ. P. provides that leave to amend "shall be freely given when justice so requires." Leave may be denied, however, if amendment would be futile. *E.g., Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962). I conclude that the proposed amendments fail to address the jurisdictional defects in BP's first amended complaint and are therefore futile. The proposed second amended complaint does not allege that Sopo Engineering engaged in any conduct that would subject it to this court's jurisdiction despite the lack of jurisdiction over Sopo. Nor does the

addition of conspiracy allegations affect the issue of jurisdiction, because jurisdiction is lacking even assuming that the acts of each alleged co- conspirator is attributable to the others. Moreover, the deletion of Nooter obviously has no effect on the issue of whether jurisdiction can be obtained over the Chinese defendants. Accordingly, I will deny the motion to amend.

D. *BP's Motion to Compel Jurisdictional Discovery*

BP's motion to compel seeks five types of information. First, it seeks correspondence between Sopo and SPECO. Secondly, it seeks correspondence between SPECO and the United States vendors. Third, it seeks technical specifications sent to the United States vendors, including specifications allegedly retrieved by Sopo from the vendors after BP filed suit. Fourth, BP seeks evidence of Sopo's contacts with U.S. vendors concerning a second acetic acid plant. Finally, it seeks deposition testimony of Sopo representatives knowledgeable about Sopo employees' visits to the United States.

The correspondence between Sopo and SPECO would at best establish an agency relationship or the existence of a conspiracy between Sopo and SPECO. BP has not argued that this discovery would be relevant to any other issues. As shown above, jurisdiction over Sopo is lacking regardless of whether SPECO's acts are attributable to it. This discovery would thus be unlikely to cure the jurisdictional defects in the first amended complaint.

Likewise, the correspondence between SPECO and the United States vendors would not help BP overcome the obstacles to jurisdiction. At most, this information would reveal that SPECO or Sopo contracted with a number of United States vendors, sent communications to the vendors, and visited the vendors in the United States in order to procure equipment for the 921 plant, and that the commu-

nications sent to the vendors contained BP's trade secrets. As I have previously noted, I lack jurisdiction over Sopo even assuming the above facts are true.

The technical specifications themselves are even less likely than the correspondence to correct the jurisdictional defects in the first amended complaint. It is difficult to imagine what this discovery would establish other than that Sopo sent documents incorporating BP's technology into the United States. Again, I lack jurisdiction over Sopo even assuming that it did so.

BP alleges that after the filing this action, Sopo engaged in procurement activity in the United States in connection with a new acetic acid plant. This new procurement activity is identical in nature to the activities that I have already determined are insufficient to establish jurisdiction. Thus, evidence of new procurement would not overcome the barriers to jurisdiction in this case.

Finally, BP seeks deposition evidence concerning Sopo's employees' visits to the United States in connection with the vendor contracts. At most, this evidence would establish that Sopo employees took an active part in the procurement of equipment from the United States vendors. My analysis of jurisdiction under the FSIA assumes as much. Moreover, BP has already deposed three Sopo employees and has questioned all three about this matter. Because none of the information that BP seeks would cure the jurisdictional defects in the first amended complaint, I will deny the motion to compel.

Accordingly,

IT IS HEREBY ORDERED that the motion to dismiss filed by defendant Jiangsu Sopo Corporation (Group) Ltd. [# 98] is granted.

IT IS FURTHER ORDERED that BP Chemical's motions to amend [# 113] and to compel jurisdictional discovery [# 121] are denied.

A separate Order of Dismissal as to defendants Jiangsu Sopo Corporation (Group) Ltd. and Zhenjiang Chemical Plant is entered this same date. The hearing for entry of default judgment as to defendant Shanghai Petrochemical Engineering Co. remains set for June 28, 2001.

Supreme Court, U.S.
FILED
AUG 12 2002
CLERK

No. 02-61

IN THE

Supreme Court of the United States

JIANGSU SOPO CORPORATION (GROUP) LTD.,

Petitioner,

v.

BP CHEMICALS LTD.,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Parties to the Proceeding

This is an action between an English plaintiff, BP Chemicals Ltd. ("BP Chemicals"), and Chinese defendants. BP Chemicals sued not only petitioner Jiangsu SOPO Corporation (Group) Ltd. ("SOPO"), a state-owned Chinese petrochemical company, but also SOPO's predecessor, Zhenjiang Chemical Plant, and its engineering contractor, Shanghai Petrochemical Engineering Co. ("SPECO"). SPECO failed to appear and a default was entered against it under Federal Rule of Civil Procedure 55(a) and Article 15 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. (Court of Appeals Appendix JA-368 to JA-370, JA-374) ("C.A. App."). Following a damages hearing, a separate default judgment was entered against SPECO and it is no longer a party to the litigation. (C.A. App., JA-2573).

Rule 29.6 Statement

Respondent BP Chemicals Ltd. is 100% owned by BP Chemicals Investments Ltd., which is in turn 100% owned by BP International, Ltd., which is 100% owned by BP Amoco plc.

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Respondent BP Chemicals Ltd. ("BP Chemicals") respectfully urges this Court to deny the petition for a writ of certiorari filed by petitioner Jiangsu SOPO Corporation (Group) Ltd. ("SOPO").

OPINIONS BELOW

Petitioner SOPO seeks a writ of certiorari to review the unanimous decision of the United States Court of Appeals for the Eighth Circuit (Petitioner's Appendix A, pp. 1a-18a) ("Petitioner's App."), which reversed an order of the United States District Court for the Eastern District of Missouri granting SOPO immunity from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, *et seq*. (Petitioner's App. B, pp. 19a-31a). The district court dismissed the case for lack of subject matter jurisdiction, ruling that BP Chemicals' trade secret lawsuit is not "based upon" commercial activity carried on by SOPO in the United States. The Eighth Circuit reversed, holding that SOPO is not immune from BP Chemicals' suit in federal court because the suit is indeed based on SOPO's commercial activity in the United States.

JURISDICTION

Respondent agrees that this Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Trade Secret Allegations

Respondent BP Chemicals, a British corporation, is the owner of a proprietary process for the design and construction of chemical plants for the manufacture of acetic acid, a bulk chemical. Petitioner SOPO is a Chinese, state-owned petrochemical company which owns and operates an acetic acid plant in China known as the 921 project. BP Chemicals alleges that SOPO misappropriated BP Chemicals' proprietary acetic acid technology and used and disclosed that technology in the United States to obtain equipment from experienced U.S. vendors to build the 921 plant in China.

The technology at issue was invented by Monsanto in the 1970's and sold to BP Chemicals in the mid-1980's. Both Monsanto and BP Chemicals exploited the commercial value of the technology by licensing it to other multi-national chemical companies, under tight confidentiality restrictions, for the construction of acetic acid plants worldwide. The BP Chemicals' acetic acid process is an important, world-leading technology, which accounts for nearly 70 percent of the annual worldwide production of acetic acid.

SOPO misappropriated BP Chemicals' acetic acid trade secrets in an unknown place and then set out to use the stolen technology in the United States to procure specialized chemical process equipment for the 921 plant. From 1993 to 1997, SOPO used and disclosed to U.S. vendors BP Chemicals' proprietary designs and specifications to obtain most of the major pieces of equipment for the 921 plant. While equipment fabrication was underway throughout the U.S., numerous delegations of Chinese engineers from

SOPO and SPECO (as well as from various PRC government agencies), traveled to the U.S. to visit vendor facilities.

Initially, these visits were to iron out design and other technical issues concerning the equipment. Later, the visits were for inspection, training, and testing of the equipment. In all, SOPO, using stolen copies of BP Chemicals' trade secrets, procured more than $10 million worth of chemical process equipment from more than 15 suppliers located throughout the U.S., and sent 71 people to this country to test and inspect these purchases on 17 separate visits stretching over four years.

BP Chemicals first learned of these events late in 1995 and early 1996 when it was contacted by a U.S. equipment vendor who had received a "bid package" from SOPO's engineering contractor. The bid package contained technical specifications for acetic acid equipment that bore a suspicious similarity to specifications that had been used by Monsanto and BP Chemicals in prior licensed projects. BP Chemicals investigated the matter and concluded that SOPO had obtained illegal access to BP Chemicals' proprietary acetic acid manuals. The documents sent by SOPO to U.S. vendors are, in large measure, slavish copies of documents used by BP Chemicals in prior licensed projects. In many cases, the documents replicate typographical errors contained in the original BP Chemicals specifications.

BP Chemicals filed suit in February 1999 against four defendants: SOPO, the owner and operator of the 921 acetic acid plant; Zhenjiang Chemical Plant, SOPO's predecessor; SPECO, a Shanghai-based engineering firm which acted as SOPO's agent in procuring equipment from U.S. vendors; and Nooter Corporation, a St. Louis-based equipment

supplier which contracted with SOPO's agents to fabricate equipment for the 921 plant. (C.A. App., JA-22 to JA-60). BP Chemicals sought declaratory relief and damages arising *not* from SOPO's operation of the acetic acid plant in China, but from its wrongful disclosure and use of BP Chemicals' proprietary technology in Missouri and elsewhere throughout the United States.

For nearly two years, SOPO successfully evaded service under the Hague Convention through a series of address changes and other bureaucratic entanglements in China. Eventually, when it became clear that the Chinese authorities would not serve SOPO, BP Chemicals moved for a default judgment. (C.A. App., JA-319 to JA-360). SOPO then appeared voluntarily and moved to dismiss the Amended Complaint,[1] claiming (among other things) immunity from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq*. (C.A. App., JA-361 to JA-363; JA-459 to JA-462).

B. The District Court's Decision

Notwithstanding the extensive commercial activity carried out by SOPO in the United States, the district court granted SOPO immunity under the FSIA. (Petitioner's App. B., pp. 19a-31a). The court acknowledged that SOPO's use of BP Chemicals' trade secrets to procure specialized equipment from U.S. suppliers constituted commercial, not sovereign, activity, and that this activity was substantial. (*Id*., pp. 21a, 24a-25a). Nonetheless, the district court found

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1. An amended complaint was filed in October 2000 to add claims for violation of Missouri common law. (C.A. App., JA-375 to JA-413).

that BP Chemicals' trade secret lawsuit was not "based upon" these U.S. activities, but was instead founded essentially upon commercial activity carried out in Asia. (*Id.*, p. 25a). The court therefore refused to invoke the commercial activity exception to the FSIA and dismissed the case for lack of subject matter jurisdiction. (*Id.*, p. 28a).

In reaching these conclusions, the district court disregarded BP Chemicals' theory of the case, which sought relief *not* from SOPO's operation of an illegal acetic acid plant in China, but from the separate and independent acts of trade secret misappropriation carried out in the U.S. — namely, SOPO's use and disclosure of stolen technology to procure specialty equipment from U.S. vendors. The court accepted that BP Chemicals' pleading challenged only the domestic acts of misappropriation. (Petitioner's App. B., pp. 22a-23a).

However, relying on *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the court characterized BP Chemicals' reliance on a disclosure theory of misappropriation to be a "semantic ploy" because BP Chemicals' true claim was based on a theft theory. (Petitioner's App. B, p. 25a). In the district court's view, SOPO's use of the stolen technology to operate a plant in China was far more central to the case than its use of the technology to procure equipment from U.S. vendors. As the Eighth Circuit noted, "the district court effectively recast BP's misappropriation claim under the rubric of theft, rather than wrongful disclosure." (Petitioner's App. A, pp. 10a-11a).

A critical flaw in the district court's analysis was its assumption that BP Chemicals could not state a separate claim for trade secret misappropriation based on SOPO's disclosures to U.S. vendors:

> Contrary to BP's assertion, SOPO's activities within the United States are not sufficient to establish a cause of action. All that SOPO allegedly did in the United States was disclose BP's trade secrets to the United States vendors. This act if proved would not itself establish a trade secret misappropriation. For BP to prevail on a misappropriation theory, it would also have to show that SOPO acquired the information in an unlawful manner.

(Petitioner's App. B, p. 27a). Rather than treat the vendor disclosures as independently tortious, the court looked only to SOPO's wrongful acquisition of BP Chemicals' technology, which the court gratuitously assumed occurred somewhere in Asia. (*Id.*, pp. 27a-28a).[2]

C. The Eighth Circuit Decision

Contrary to the district court's holding, the court of appeals had little difficulty concluding that BP Chemicals' trade secret action is indeed "based upon" commercial transactions that occurred within the U.S. The court first discussed the Missouri law of trade secrets, finding

2. Contrary to SOPO's contention, there are no facts in the record from which *any* conclusion can be drawn as to where the initial theft occurred. The technology could have been leaked by BP Chemicals' licensee in Taiwan, or, equally as plausible, it could have been leaked by a former Monsanto or BP Chemicals employee living in the U.S. or Great Britain. In a recent case brought by BP Chemicals against a former licensing executive employed by both BP Chemicals and Monsanto, *BP Chemicals Ltd. v. Baloun*, No. 00-12034-FM (Bankr. W.D. Tex. Mar. 26, 2001) (Adv. No. 00-1129-FM), it was revealed, after merits discovery, that a Taiwanese company had purchased BP Chemicals proprietary manuals from this former employee and that the illegal sale had occurred in St. Louis, Missouri.

substantial support for the notion that improper acquisition and improper disclosure are alternative forms of misappropriation. The court then focused on BP Chemicals' right, as master of its complaint, to choose between a wrongful acquisition and wrongful disclosure claim:

> BP has elected to pursue a misappropriation claim against SOPO stemming from SOPO's purported wrongful *disclosure* of BP trade secrets to American engineering firms. BP might have chosen to pursue theft-type claims against SOPO, but BP elected not to do so and *that strategic, legal choice is well within BP's discretion as the master of its complaint. . . . [W]e believe the MUTSA permits a trade secret holder to pursue both theft and disclosure claims for misappropriation. One type of claim does not preclude the other.* Our review of trade secret law confirms that the MUTSA is hardly novel in this respect: *a plaintiff may premise his misappropriation claim on any or all of these alternate forms of improper conduct.*

(Petitioner's App. A, p. 9a) (first emphasis in original).

Having determined that BP Chemicals had pleaded a valid claim based on a wrongful disclosure theory, the court examined whether the claim satisfied the required nexus with the United States to invoke the commercial activity exception to the FSIA.

> We believe BP's disclosure-type MUTSA claim is "based upon" SOPO's commercial activity carried on in the United States. . . . In the course of proving [its] claim, *BP says it will demonstrate*

> *SOPO disclosed BP's trade secrets to American vendors in the United States while procuring equipment to fabricate the 921 plant. BP's MUTSA claim satisfies the required nexus with the United States because the claim is linked to SOPO's procurement activities in the United States.* Therefore, we have little difficulty concluding that an element of BP's claim is based upon events transpiring in the United States — SOPO's disclosures to American vendors.

(*Id.*, pp. 9a-10a).

Contrary to SOPO's contention, the Eighth Circuit did not distinguish between a "one element" test and a "gravamen" test. Instead, it simply applied the holding of *Saudi Arabia v. Nelson* that an "action is based upon the elements that prove the claim, no more no less." Having determined that Missouri law recognized BP Chemicals' wrongful disclosure claim and having determined that SOPO's disclosures of trade secrets to U.S. vendors "lies at the very heart of BP's action," the Eighth Circuit had no difficulty concluding that BP Chemicals' claim satisfied the required nexus with the United States because the claims are directly linked to SOPO's procurement activities in the United States. The result would have been the same whether one applied a "one element" test or a "gravamen" test.

REASONS FOR DENYING THE WRIT

Petitioner's sole basis for seeking *certiorari* is an alleged split in authority among the circuits over the proper test to be applied under clause one of the commercial activity exception of the FSIA. According to SOPO, circuit courts

are divided on this issue, with some applying a "one element test," and others applying a "gravamen test." This purported "split" is entirely contrived.

The Eighth Circuit's ruling is not in conflict with *Saudi Arabia v. Nelson* or with subsequent, and now settled, FSIA law. The court properly applied the test of *Saudi Arabia v. Nelson,* holding only that BP Chemicals' amended complaint alleged sufficient facts to overcome, as a pleading matter, SOPO's assertion of sovereign immunity. It neither creates nor widens any alleged "split" in circuit authority over the proper application of Supreme Court precedent. The case is uniquely fact-specific and presents no question of general interest or import worthy of this Court's consideration.

I.

THERE IS NO SPLIT OF AUTHORITY IN THE CIRCUITS REGARDING THE APPLICATION OF THIS COURT'S DECISION IN *SAUDI ARABIA v. NELSON*

The *Question Presented* by SOPO's petition rests on a false "split" in circuit authority regarding the application of *Saudi Arabia v. Nelson*. SOPO frames the issue in this case entirely and exclusively in terms of this phantom "split" in authority:

> Under this Court's decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), does the commercial activity exception set forth in the first clause of 28 U.S.C. § 1605(a)(2) apply whenever "one element" of the plaintiff's claim is "based upon" a foreign state's commercial activity in the United

> States, without regard to the significance of that element to the claim (as held by the Eighth and Ninth Circuits), or must the commercial activity within the United States be the "gravamen" of the claim (as held by the Second, Third, and Fifth Circuits)?

(Petition, p. (i)).

In reality, none of the decisions cited in the petition holds that a court can or should ignore the significance of the foreign state's U.S. activities when determining whether such U.S. activity forms a basis of a plaintiff's claim. Rather, in each of the decisions — including the cases labeled by SOPO as "one element" cases —the lower courts adhere to this Court's direction in *Saudi Arabia v. Nelson* to look to "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993).

Each decision supposedly representing the opposing end of a divided judiciary in fact applies *Saudi Arabia v. Nelson* in consistent fashion to the facts before it, and each recognizes that the entire case need not be based on the commercial activity of the defendant to establish jurisdiction. *See Saudi Arabia v. Nelson*, 507 U.S. at 358 n.4 ("We do not mean to suggest that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state").

For example, in *Sun v. Taiwan*, 201 F.3d 1105 (9th Cir.), *cert. denied*, 531 U.S. 979 (2000), the Ninth Circuit recognized that the whole case need not be based on the foreign state's U.S. activity to confer jurisdiction under the

FSIA. Plaintiffs were the parents of an American student who drowned in Taiwan while participating in a cultural tour sponsored by the government of Taiwan. On their claim of negligent supervision, the court found that because the U.S. activity alleged in the complaint did not form *any* element of that claim, jurisdiction under the FSIA did not exist for that claim.

As to plaintiffs' negligent misrepresentation claim, however, the court remanded for determination of whether plaintiffs sufficiently alleged a claim of negligent misrepresentation based on the tour organizers' failure, in the U.S., to take reasonable care in arranging the tour itinerary so as to avoid known dangers. *Sun*, 201 F.3d at 1110. The court of appeals' ruling in *Sun* does not represent the application of a "one element test" *or* a "gravamen test." The decision is merely a recognition that FSIA jurisdiction must be based on *some* element of U.S. activity.[3]

The Ninth Circuit's decision in *Sugimoto v. Exportadora De Sal, S.A. De C.V.*, 19 F.3d 1309 (9th Cir. 1994), is no different. That case involved a wrongful death claim based on pilot negligence occurring while a plane chartered by a Mexican government-owned entity flew from one point in Mexico to another, but crashed in the U.S. after encountering fog in U.S. airspace. In finding jurisdiction to exist, the court of appeals acknowledged, based on a routine application of *Saudi Arabia v. Nelson*, that an action is based upon

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3. Contrary to SOPO's position, the concepts of looking to an "element" of plaintiff's claim or looking to the "gravamen" of a plaintiff's claim are not mutually exclusive. They both represent a mutual rejection of the position adopted by the district court in this case that *all* of the elements of a plaintiff's claim must be based on the foreign sovereign's U.S. activity. (Petitioner's App. B, p. 27a).

commercial activity in the United States if an element of the plaintiff's claim consists of conduct that occurred in commercial activity carried on in the United States. *Sugimoto*, 19 F.3d at 1311. Because an element of plaintiffs' claim — in fact a key element — was the tortious flying of the plane in United States air space, the court held that jurisdiction existed under the FSIA. *Id.* It was a rather unremarkable proposition under the facts of the case.

The court of appeals in *Sugimoto* did not engage in the element-counting exercise posited by SOPO's petition, but rather looked to the elements of plaintiffs' claims to determine if jurisdiction existed, as it was compelled to do under this Court's pronouncement in *Saudi Arabia v. Nelson* that "[a]n action is based upon the elements that prove the claim, no more and no less." 507 U.S. at 357. As with the Eighth Circuit's decision in this case, the Ninth Circuit decisions in *Sun* and *Sugimoto* merely represent the courts' reasoned application of *Saudi Arabia v. Nelson* to the facts of the cases before it.[4]

SOPO cites three cases for the other side of the alleged split — the so-called "gravamen" test. Two of these decisions acknowledge that jurisdiction can exist if a plaintiff shows

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4. SOPO's petition omits mention of another case it would falsely tag with applying a "one element, no matter how insignificant, test." In *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994), the court rejected the plaintiff's claim because "Goodman has not shown, as *Saudi Arabia* requires, that the domestic commercial activity constitutes an 'element[] of a claim that . . . would entitle [Goodman] to relief under [its] theory of the case.'" 26 F.3d at 1146 (inserts in original). Again, the rather unremarkable proposition that *some* element of U.S. activity must exist to confer jurisdiction under the "commercial activity" exception to the FSIA was the basis for decision.

that the domestic activity constitutes "an element" of plaintiff's claim. In *Aldy v. Valmet Paper Machinery*, 74 F.3d 72 (5th Cir. 1996), the Fifth Circuit found jurisdiction to exist over a negligent manufacture and design claim and over a failure to warn claim where the only U.S.-based element in either claim was the fact that plaintiffs were injured and died in the U.S. *Id.* at 75-76.

In *Federal Insurance Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270 (3d Cir. 1993), the Third Circuit held that a claim was not based on U.S. activity where the only U.S. activity alleged was the formation of two wholly-owned subsidiaries to invest in U.S. real estate. Since the plaintiff would not need to prove that the defendant formed those corporations in order to prevail, the court found no basis for jurisdiction. *Id.* at 1289. Nonetheless, the decision acknowledged that jurisdiction could exist if such were a needed element of plaintiff's claims. *Id.*[5]

Finally, in *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for Galladari*, 12 F.3d 317 (2d Cir. 1993), the Second Circuit decided that the "gravamen" of plaintiff's claim was the sovereign's *judicial* — as opposed to commercial — activities, which had only an attenuated "effect" on the United States. *Id.* at 329-30. No meaningful element of commercial activity was even involved in that case.

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5. It bears mention that the two decisions noted above were both "clause three" cases involving allegations related to alleged "act[s] outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere . . . that causes a direct effect in the United States." In these cases, the courts did not have to engage in *any* examination of U.S.-based commercial activity at all.

As a close reading of these supposedly divergent opinions reveals, the real question presented by SOPO is whether a court must utter magic words such as "gravamen" or "foundation" somewhere in its opinion in order to comport with this Court's holding in *Saudi Arabia v. Nelson*, or whether it is sufficient that the court look to "the elements of a claim that, if proven, would entitle a plaintiff to relief" to determine if a plaintiff's claims are "based upon" significant U.S. commercial activity. That question is not one that needs asking at all, much less an answer from this Court.

II.

THE EIGHTH CIRCUIT'S RULING IS CONSISTENT WITH THIS COURT'S DECISION IN *SAUDI ARABIA v. NELSON* AND SETTLED FSIA ANALYSIS

The court of appeals' decision in this case represents a straightforward and unremarkable application of settled FSIA law in a unique factual context. The court's primary reasoning for reversing the district court was its finding that Missouri law *does* in fact recognize the independent tort of wrongful disclosure of a trade secret. (Petitioner's App. A, pp. 7a-9a). Given this finding, a plaintiff such as BP Chemicals is permitted under Missouri law to plead a claim for wrongful acquisition *or* wrongful disclosure, *or both*. (*Id.*, p. 9a). Since BP Chemicals' amended complaint pleaded a claim of wrongful disclosure based on SOPO's disclosure of BP Chemicals' trade secrets in the United States, (*id.*, pp. 9a-10a), the obvious conclusion to be drawn was that BP Chemicals' wrongful disclosure claim was "based on" SOPO's U.S. activity. (Petitioner's App. A, pp. 17a).

In reaching this decision, the Eighth Circuit did not apply a novel application of this Court's decision in *Saudi Arabia*

v. Nelson, nor did it create or widen an alleged "split" in circuit authority between courts applying a so-called "one element test" and those applying a so-called "gravamen test." Rather, the court of appeals in this case, as in all the decisions applying *Saudi Arabia v. Nelson* cited by SOPO in its petition, based its analysis on whether the U.S. connection alleged in the amended complaint was a necessary element of the plaintiff's claim.[6] Given the allegations in BP Chemicals' amended complaint about SOPO's U.S. activity and the existence of an independent cause of action under Missouri law for wrongful disclosure, it was no stretch of

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6. *See BP Chemicals Ltd. v. Jiangsu SOPO Corporation (Group) Ltd.* (Petitioner's App. A, pp. 1a-18a) (finding that facts alleged in amended complaint related to wrongful disclosure of trade secrets in the U.S. was a necessary element of plaintiff's wrongful disclosure claim); *Sun v. Taiwan*, 201 F.3d 1105 (9th Cir. 2000) (finding that plaintiffs' claim of negligent supervision related to drowning in Taiwan was not based on U.S. commercial activity but that claim of negligent misrepresentation based on statements made in U.S. might support jurisdiction); *Sugimoto v. Exportadora De Sal, S.A. De C.V.*, 19 F.3d 1309 (9th Cir. 1994) (finding jurisdiction to exist because wrongful death claim included necessary element of negligent flying while in U.S. air space); *Aldy v. Valmet Paper Machinery*, 74 F.3d 72, 75-76 (5th Cir. 1996) (finding jurisdiction to exist over claim based on negligent design and manufacture of machine in Finland where plaintiffs' deaths in the U.S. was sole domestic "element" of their claims); *Federal Insurance Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1289 (3d Cir. 1993) (finding jurisdiction not to exist because proving that companies were formed to invest in U.S. real estate, the sole U.S. activity engaged in by the foreign sovereign, was not a necessary element to plaintiff's claims); *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for Galladari*, 12 F.3d 317, 329-330 (2d Cir. 1993) (finding that tangential "effect" in the United States did not confer jurisdiction over claim based on noncommercial sovereign judicial activity conducted elsewhere).

the holding of *Saudi Arabia v. Nelson* to find that BP Chemicals asserted a viable claim "based on" SOPO's U.S. activities.

The Eighth Circuit did not reject any so-called "gravamen test" to find that the district court erred when it held that BP Chemicals' wrongful disclosure claim is not "based upon" SOPO's commercial activity in the United States. It merely rejected the district court's strained interpretation of what actually was the "gravamen" of one of the claims asserted by BP Chemicals. To uphold the "gravamen" test as applied by the district court would lead to the perverse result that jurisdiction over SOPO would exist if BP Chemicals had alleged only a *single claim* based on wrongful disclosure in the United States (albeit a claim which the district court erroneously failed to recognize), but that by identifying *additional* tortious activity by SOPO in the amended complaint, some of which may have occurred in China, jurisdiction over SOPO would be lost.

The Eighth Circuit's application of *Saudi Arabia v. Nelson* to the unique facts of this case does not warrant review in this Court.

III.

THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION

SOPO's bid for *certiorari* rests entirely on a manufactured "conflict" among the circuits, from which it argues *certiorari* should be granted to establish a uniform application of this Court's decision in *Saudi Arabia v. Nelson*. There is no "conflict" for this Court to resolve. The courts

of appeals are consistent in their approach to the question of whether a plaintiff's claims against a foreign sovereign are "based on" U.S. activity. From a *certiorari* standpoint, this case is not unusual or particularly important in any respect.

Nor is there any legitimate certworthy question of federal policy or statutory interpretation posited by this case. The Eighth Circuit's decision was largely fact-specific and state-law specific. As a consequence, a review of this case is unlikely to establish principles of wider applicability.

CONCLUSION

For the foregoing reasons, petitioner Jiangsu SOPO Corporation (Group) Ltd.'s petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

JIANGSU SOPO CORPORATION (GROUP) LTD.,
Petitioner,

v.

BP CHEMICALS LTD., an English Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Sopo's Petition demonstrates that at least the Second (*Drexel Burnham Lambert Group Inc. v. Committee of Receivers for Galadari*, 12 F.3d 317 (2d Cir. 1993)), Third (*Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270 (3d Cir. 1993)), and Fifth (*Aldy ex rel. Aldy v. Valmet Paper Mach.*, 74 F.3d 72 (5th Cir. 1996)) Circuits clearly follow the "gravamen" test, and their decisions are manifestly consistent with *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). BP's opposition discusses these decisions and agrees with Sopo that the decisions apply a "gravamen" or "foundation" test

and are consistent with *Nelson*. (BP Opp. at 10.) The dispute is thus over the court of appeals' decision below and the decisions of the Ninth Circuit on which it was based.

BP argues that there is no split in the circuits because the decision below complies with this Court's ruling in *Nelson*. However, when the court of appeals' stated "one element" rationale is considered in view of *Nelson's* reasoning and specific holding—that the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602 et seq. (2002) commercial activity exception denies immunity only to such actions whose "gravamen" consists of commercial activity carried on by the foreign state in the United States—the substantive disparity between the decisions is obvious. BP admits that the court of appeals' decision follows the rationale of two "one element" decisions of the Ninth Circuit. (BP Opp. at 10-11.) Thus, if the decision below is inconsistent with *Nelson*, we have, by BP's own implicit admission, the very split in the circuits (the Ninth and Eighth Circuits as against at least three other circuits) that Sopo's Petition urges as grounds for this Court's review.

BP's essential argument in opposition is that "the real question presented by Sopo is whether a court must utter magic words such as 'gravamen' or 'foundation' somewhere in its opinion." (BP Opp. at 14.) This suggestion is absurd. The question presented is whether the courts are following the intent of Congress that a uniform standard be applied in deciding the delicate issue of sovereign immunity. There is no question that there is a real dichotomy in how the circuits have been dealing with this issue.

ARGUMENT

Despite urging that "[t]he court of appeals' decision in this case represents a straightforward and unremarkable application of settled FSIA law" (BP Opp. at 14), BP's opposition

does not quote or even refer to the actual reasoning of the court below, which was as follows:

> The FSIA contains no definition of "based upon," so we must accord that phrase its plain and ordinary meaning in interpreting the statute. *Nelson*, 507 U.S. at 357, 113 S.Ct. 1471. "[A] claim is 'based upon' events in the United States if those events establish a legal element of the claim. . . . An action is based upon the elements that prove the claim, no more and no less. If *one of those elements* consists of commercial activity within the United States or other conduct specified in the Act, this country's courts have jurisdiction." *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) (cited approvingly on this point in *Nelson*, *supra*). *We emphasize that only one element of a plaintiff's claim must concern commercial activity carried on in the United States.*" "The entire case need not be based on the commercial activity of the defendant." *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000).

(App. at 6a (emphases added).)

There is nothing straightforward or unremarkable about this holding. Unless read carefully, one might conclude that the court of appeals is quoting from *Nelson*. It is not. As discussed in Sopo's Petition (*see* Petition at 9-10), the court of appeals is quoting from a pre-*Nelson* decision, *Santos*, 934 F.2d at 893. Thus, without quoting *Nelson* itself, the court below suggested that *Santos*' "one element" language was "cited approvingly" by *Nelson*. This is incorrect. The key language of *Nelson*, not quoted or discussed by either the court below or BP (which also fails to discuss or even cite *Santos*), stated as follows:

> the phrase ["based upon"] is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case. *See Callejo v. Bancomer, S. A.*, 764 F.2d 1101, 1109 (5th

> Cir. 1985) (focus should be on the "gravamen of the complaint"); *accord*, *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) ("An action is based upon the elements that prove the claim, no more and no less.")

(*Nelson*, 507 U.S. at 357).

That is what this Court said. The court below purported to put words in this Court's mouth that were not uttered—to assert that this Court had cited *Santos* "approvingly on *[Santos' "one element"] point.*" (App. at 6a (emphasis added).)

The aspect of the court of appeals decision that BP does emphasize simply underscores why the tests of "gravamen" and "one element" are different, and why the split among the circuits is substantive. BP points out the unremarkable statement by the court of appeals that the Missouri Uniform Trade Secrets Act ("MUTSA"), Mo. Rev. Stat. § 417.453 (2002) "defines misappropriation to take two forms"—wrongful acquisition and wrongful disclosure. (App. at 7a (cited in BP Opp. at 14).) BP stresses that it chose to assert a "wrongful disclosure claim" (BP Opp. at 7), that "disclosure" is "one element" of that claim (BP Opp. at 8 (citing App. at 9a-10a)) and, therefore, the court of appeals was correct in holding that, if the disclosure is alleged to have been carried out in the United States, FSIA immunity has been overcome, at least for pleading purposes.

And here we come to heart of the matter. For, while the term "gravamen" has a long history and well-understood legal usage, the term "one element" invites a court, disposed to find jurisdiction, to ignore the core or essence, i.e., the "gravamen", of the plaintiff's claim, and to focus instead on some aspect of the claim involving U.S. activity. Here, for example, it cannot be gainsaid that the act of "disclosure" is "one element" of BP's claim. But it is equally clear that this element is not the essence of BP's claim of "*wrongful*

disclosure," a claim primarily founded upon events allegedly giving rise to a duty of non-disclosure, events which in this case took place in Asia. (Petition at 17.)

The "gravamen" test provides precisely the instructional power that the "one element" test lacks. In the case at bar, the "gravamen" test would force a court, as it did the district court, to look beyond some act of disclosure *per se*, to those events that would turn such an otherwise innocent act into a tort. BP is wrong when it asserts that "[a] critical flaw in the district court's analysis was its assumption that BP Chemicals could not state a separate claim for trade secret misappropriation based on SOPO's disclosures to U.S. vendors." (BP Opp. at 5.) BP has not advanced a claim "based upon" the "disclosure" of alleged BP trade secrets. It has made a claim based upon the "*wrongful* disclosure" of such materials.

The court of appeals itself recognized that the disclosure of trade secrets, *per se*, is not tortious, in stating that BP's "claim requires BP to prove Sopo disclosed BP's trade secrets to others without consent, *while having reason to know the trade secrets were acquired under circumstances giving rise to a duty to maintain their secrecy. See* Mo. Rev. Stat. § 417.453(2)(b)(c)." (App. at 9a.) BP knows that this italicized statement is fatal to its argument that a claim for *wrongful* disclosure can be said to be "based upon" the mere allegation that "Sopo disclosed BP's trade secrets to others". Unable to argue around the italicized statement by the court of appeals of BP's claim, which emphasizes the events necessary to make otherwise innocuous disclosures tortious, BP resorts to "ellipsing" the *entire sentence* out of the paragraph from the court of appeals' opinion, which it otherwise quotes in full. (BP Opp. at 7-8.)

The issue of standards is thus hardly a matter of uttering "magic words". Both the district court and court of appeals put the lie to BP's cavalier assertion that "[t]he result would have been the same whether one applied a 'one element' test

or a 'gravamen' test." (BP Opp. at 8.) Each court, *after* announcing the standard it had decided to apply ("gravamen" and "one element," respectively), then stated that deciding the case posed "little difficulty." (App. at 10a, 26a.)

Certainly the United States, in urging this Court to overturn the decision by the Eleventh Circuit in *Nelson* and adopt a "gravamen" test, did not regard the issue of standards as a matter of choosing "magic words". The United States urged a "gravamen" test because it provides real legal guidance, while the "one element" test is an invitation to the application of virtually unbounded discretion. As if to underscore its own recognition that it is not simply following a well-settled rule, the court of appeals, in the critical paragraph of its opinion (*see supra*, p. 2) added the following otherwise gratuitous sentence: "*We emphasize that only one element of a plaintiff's claim must concern commercial activity carried on in the United States.*" (App. at 6a (emphasis added).)

It being clear that the dichotomy of results reached by the district court and court of appeals is a direct function of the disparate standards they applied, BP's effort to dispel the significance of the admitted split in standards among the circuits is futile. In the key paragraph setting forth its holding and reasoning (*see supra*, p. 2), the circuit court decisions cited by BP are the Seventh Circuit's pre-*Nelson* "one element" decision in *Santos*, and the Ninth Circuit's "an element" decision in *Sun v. Taiwan*, 201 F.3d 1105 (9th Cir.), *cert denied*, 531 U.S. 979 (2000), which was based upon a prior Ninth Circuit case, *Sugimoto v. Exportadora De Sal, S.A. De C.V.*, 19 F.3d 1309 (9th Cir. 1994).

The pre-*Nelson Santos* case merits no further discussion. *See supra*, p. 2-3. As for the Ninth Circuit decisions, they perfectly illustrate, as does the decision below, both the existence and substantive nature of the split among the circuits.

BP cannot and does not attempt to deny the self-evident fact that both *Sun* and *Sugimoto* apply an "an element" test. *Sugimoto* simply miscited *Nelson*, stating that "[a]ccording to *Saudi Arabia*, an action is based on commercial activity in the United States if *an element* of the plaintiff's claim consists . . . [of] commercial activity carried on in the United States." *Sugimoto*, 19 F.3d at 1311 (citing *Nelson*, 507 U.S. at 355-56). Obviously, that is not what *Nelson* stated. Whether the Ninth Circuit in *Sugimoto* felt that a proper analysis under *Nelson* would lead to a result the court subjectively felt would be wrong, or for other reasons, its "an element" language was clearly unauthorized. Its holding was subsequently picked up and relied upon in *Sun*. *Sun*, cited and relied upon by the court of appeals (*see supra*, p. 2), affords another graphic example of how a "one element" or "an element" standard leads to results inconsistent with a "gravamen" test, and how it invites claim manipulation of the type this Court in *Nelson* expressly condemned.[1]

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[1] The United States and this Court's decision in *Nelson* were concerned about the ability of plaintiffs to gerrymander claim language so as to make it appear that a claim bore a substantial relationship to the United States when in fact it was based upon non-U.S. commercial activities. In addition to the other problems apparent in the court of appeals' opinion, it held that this Court's reference to "semantic ploys" was reserved for claims, such as, in its view, the claim in *Nelson*, that were "absurd" on the face of the pleading. (App. at 11a.) How the court reached this conclusion is difficult to discern. There is nothing in the *Nelson* Court's majority opinion suggesting this interpretation. *See Nelson*, 507 U.S. at 363. And, certainly, it was not the view of two of the three judges on the Eleventh Circuit, who voted to uphold the Nelsons' claim. And, likewise, it was not what the dissenters in this Court's *Nelson* decision believed. This Court's "semantic ploy" warning had to do with clever pleading that would mislead a court into a decision that substituted form for substance—precisely the gambit that BP attempted, unsuccessfully in the district court and successfully in the court of appeals. When added to its redaction of this Court's definition of "based upon", the court of appeals'

The Suns originally sued Taiwan for negligent supervision in the drowning death of their son on a beach in Taiwan while on a trip organized by the Taiwanese government. Because the district court, in that case, found no subject matter jurisdiction since *no element* of the Suns' claim consisted of conduct occurring in the United States, the Suns modified their claim to one for negligent misrepresentation, arguing that Taiwan's failure to disclose, in the United States, the dangers of participating in the beach trip, was tortious. Under *Nelson*, the "gravamen" of this refashioned claim would clearly still be Taiwan's failure adequately to supervise the Suns' child, and the negligent misrepresentation claim would be recognized, as was the failure to warn claim in *Nelson*, as a semantic ploy to achieve jurisdiction. The *Sun* court quoted *Sugimoto* as if it, rather than this Court, had defined the meaning of "based upon" in the FSIA. Like the court of appeals, the Ninth Circuit went out of its way to "emphas[ize]" an "an element" standard. *Sun*, 201 F.3d at 1109.[2]

In sum, the court of appeals *chose* to follow the Ninth Circuit's "an element" interpretation of *Nelson*, as well as the pre-*Nelson* "one element" language of the Seventh Circuit in *Santos*. It is more than axiomatic, however, that the courts of appeal are denied the luxury of choice once this Court has spoken. The rest of the circuits that have confronted this

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extraordinary interpretation of this Court's "semantic ploy" warning amounts, effectively, to a renunciation of *Nelson* in all respects.

[2] The *Sun* court allowed the plaintiffs to recast their claim, distinguishing *Nelson* on the ground that "[t]he Suns' point is not that tour organizers have a duty to warn of their negligent acts, but rather that there is a duty to take reasonable care in arranging a tour itinerary." *Sun*, 201 F.3d at 1110. Plainly, this is a distinction without a difference and flies in the face of this Court's "semantic ploy" admonition in *Nelson*—that "To give jurisdictional significance to [such a] feint of language would effectively thwart the Act's manifest purpose." *Nelson*, 507 U.S. at 363.

question have fallen into line with *Nelson*, whether they like it or not. The FSIA represents critical federal policy affecting the country's foreign relations. It is an area Congress meant to subject to uniform standards and as to which this Court affirmed uniform standards. They should be followed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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